

The Performance Review Podcast

Episode 18

Greenberg Traurig

Speaker 1 ([00:06](#)):

Welcome to The Performance Review, Greenberg Traurig's California Labor and Employment Law Podcast, where we discuss and review important trends and topics for California employers with hosts, Ryan Bykerk and Philip Person.

Philip Person ([00:18](#)):

Welcome back to The Performance Review. Last episode, we discussed the major case in the PAGA arena that is Viking River Cruises. Today, we're going to discuss the proposed legislation and lobbying around PAGA; something that we're not too familiar with, but we have our guest here today who can help us with that.

Ashley Hoffman. A policy advocate for labor and employment at the California Chamber of Commerce, Cal Chamber, for short, for most of you, and just found out that Ashley also has been on a podcast before, or records her own podcast, so she's the pro here. Welcome to the performance review, and hopefully we can learn a lot about podcasting and about the upcoming legislation.

Ashley Hoffman ([01:04](#)):

Thank you guys. It's really good to be here. Yeah, so I am the policy advocate for labor and employment at Cal Chamber. My background; I am an attorney. I practice labor and employment law between clerking and then working at a law firm for about five years. Most recently at a law firm that exclusively also did labor and employment law, so this was a fun transition into policy work for me and my day to day involves lobbying on bills, reviewing case law legislation, as well as we do try and push out some articles and a lot of content to our members to help them comply with California's labor laws.

Ryan Bykerk ([01:42](#)):

We really appreciate you being here, as is always the case. Our guests are our experts and you are certainly one, so we appreciate you being on and teaching us a thing or two.

We've been talking a lot about PAGA and we'll do that again here today. We talked last week, in our last episode rather, about the Viking River case and how that's really shaped PAGA. Before that we talked about the Wesson case and of course, since then there's been the Estrada case. There's a split on manageability. I'm sure all of these are really fond memories from when you were directly dealing with these, litigating, and of course now they shape the policy landscape that you're a part of.

The California Supreme court is set to hear this case, Adolph versus Uber Technologies. Viking River more or less invited some... At least the concurrences, invited some additional work on the part of the legislature. How active has the California legislature been about PAGA?

Ashley Hoffman ([02:39](#)):

Obviously we have a lot of concerns about PAGA, which I'm sure your listeners and you have touched on a lot. One of our frustrations is that it is clear that there are a lot of folks in the legislature who understand the problems with PAGA, but the legislature really... There has not been an appetite to do anything about it, despite tons of bills that have been introduced over the years, some even supported by governors. Except for one small fix under Governor Brown, the only bills that have ever passed are carved out for two unionized industries. That's really it. Any PAGA related bill is pretty dead on arrival, upon labor committees, and that's been really obviously unfortunate to see.

Even in the Viking River Cruises case, Sotomayor's concurrence kind of mentioned that the California legislature could do something to modify PAGA. We had a lot of concerns about what that could mean. Potentially broadening of standing. There was a Senator who expressed that they may run legislation, but with less than a week to go in the legislative session we fortunately haven't seen anything. I think that is likely due to the court granting review in Adolph V Uber and my guess is they will probably want to see what happens there, but it's very possible that this comes up next year. Especially now that our ballot initiative to repeal or replace PAGA, the Fair Pay and Employer Accountability Act, has qualified for the 2024 ballot.

Philip Person (04:16):

Well, let's talk about the Fair Pay and Employer Accountability Act. Heard about this initiative, but what exactly is the bill intended to do?

Ashley Hoffman (04:26):

The initiative would replace PAGA with increased agency enforcement. PAGA itself would go away, but workers would be able to, obviously, pursue penalties through the labor commissioner, the labor commissioner would have additional means of granting penalties, they could even double penalties if there is a willful violation of the statute. One of the other pieces of the initiative that I'm excited about is it has an advice kind of council department, kind of similar to what Cal/OSHA has, in that businesses could submit requests for guidance on certain issues. The department would then respond and would be bound by that and would be required to a certain degree to post some of that online, so you have a lot more concrete guidance coming from the department that folks can feel comfortable relying on to hopefully stave off some of what we're seeing in the courts, which is courts just kind of doing whatever they want, making that retroactive, which could be really frustrating. Also too, we really want to make sure that we are limiting attorney's abilities to leverage PAGA for considerable amounts of attorney's fees as well.

Philip Person (05:49):

You had me at replace PAGA, so hello. I'm sure many are wondering because I'm frankly wondering, when and how do I vote for this and will it appear on a certain ballot or a ballot in the future?

Ashley Hoffman (06:06):

It will not be on the 2022 ballot, but be sure to look out for it in the November 2024 ballot. We received the more than 700,000 signatures to be able to be eligible, so that to us really signifies how much PAGA has affected Californians and businesses of all sizes. Had a lot of small business, of course, interests in this as well. It is gaining a lot of traction and I think, especially with a lot of what's been going on the courts, we've seen an uptick really in our interest in the initiative.

Ryan Bykerk (06:38):

That makes a lot of sense. I want to talk about small business here in just a second, but one of the parts I particularly appreciate about what you've just said about what this ballot measure would do is as it relates to advice and position letters and things that would actually help. I think one of the original purposes of PAGA was to generate funds so that the labor and workforce development agency could then educate employers. It certainly generated funds. I don't know how much that has been used to educate employers, but it sounds like that's really the purpose of this legislation.

Ashley Hoffman ([07:11](#)):

A fun fact on that is, something that we found is, a lot of the money from the PAGA fund was actually given to the general fund when they needed it at one point, so it's like owed money back from the general fund.

Ryan Bykerk ([07:22](#)):

Geez. Okay. All right, well that's not exactly the sales pitch that was given when PAGA first came out. But anyway, back to small businesses. I was actually talking... I meet with this group of business owners and one of them mentioned this morning, a friend who had a small business got hit with a PAGA suit, ended up having to sell their building in order to pay off the judgment that came as a result of it. So certainly, and it's not hard to imagine how PAGA claims have impacted sole proprietors and mom and pop businesses, small partnerships, that sometimes have to face bankruptcy when dealing with these claims. Can you talk a little bit about how the Fair Pay and Employer Accountability Act helps in that regard?

Ashley Hoffman ([08:02](#)):

When I was litigating, I had cases like that. One that stands out is we had a nonprofit that did just a tremendous amount of work in the community and housed people. They too had to sell a building to pay their PAGA lawsuit. That, unfortunately, is common. One of the good things about this is that the department that it would create to provide council to businesses is, if you ask for guidance, once you're provided that if you realize that you have been committing an error, you would have a period of time to correct those errors.

Of course, if you owe workers any wages or anything like that, you would have to pay all of that but there would be a certain amount of time for you to cure where you wouldn't have extra penalties assessed against you. That's one of the really good pieces and then again, because we are large, obviously people can be represented and claims of the labor commissioner but you are really taking out that huge leverage of the penalties, plus the 30% attorney fees on top of that, making sure that small businesses don't have to do something like sell property just to pay off this lawsuit.

Ryan Bykerk ([09:14](#)):

Right. The idea being of course, that... The point of course is to increase compliance.

Ashley Hoffman ([09:19](#)):

Right, exactly.

Ryan Bykerk ([09:21](#)):

That's really what that does. Okay. I guess we'll have to wait and see how that shakes out. One of the things that Cal Chambers does is you have a job killers and job creators list, which is a cool way of organizing these bills. Really kind of a two part question here. Are there any other bills that employers

and employees should know about? That's part one. Then part two, we saw that you were recently quoted in a PoliticoPro article talking about SB 1162, so that's certainly one of them but yeah, if you could talk about a couple of those that would help.

Ashley Hoffman ([09:55](#)):

The two that I just want to flag, especially for compliance purposes... We worked considerably with an author, [inaudible 00:10:03], on bereavement leave proposal over the last few years. It was a former job killer bill, but we were able to work out some amendments and are now neutral on it, whereby it's ensuring that folks have at least some time to take for bereavement leave. As long as that passes, which we expect it will, will be in place 2023. AB 1041 just passed off the Senate floor. Again, had been a former job killer bill that we were able to negotiate some amendments on, so while we are still opposed it is considerably less problematic. It will amend CFRA to say that in addition to the family members outline that you can take leave to care for, you can also take care of a designated person of your choice, but the employer can limit that to one person per every 12 months.

Those are some big ones. In the fast food industry, there's a fight going on in AB 257, which has some very problematic provisions related to the fast food industry and specifically calling out franchisees and some joint liability issues. Have concerns that that could raise the cost considerably of fast food, which a lot of folks rely on in feeding their families.

Those are some of the big ones out there. And then yes, SB 1162 was a job killer for us. The bill has two parts. The first section amends the DFEH pay data reports that employers were required to start filing starting in 2021. It slightly expands it to include workers hired through contractors. It also expands it to include a mean and median wage for each of the job categories. There had been a really problematic provision whereby all of those reports would be published online by company. That really was why it was a job killer for us, and so we lobbied very hard to get that piece removed and were able to successfully do so, which was great. Section two of the bill requires employers to put salary ranges on all of their job postings, akin to what you're seeing in other states, as well as provide a salary range to a current employee who asks for it for their position.

One piece of good news; hopefully this is of some comfort folks listening, is that the labor commissioner's office, when they were talking with the author's office about amendments, actually specifically said that section two does not fall under PAGA. It will be covered by the notice and posting exemption. That was really good to hear some confirmation that section two won't fall under PAGA.

Philip Person ([12:54](#)):

Ashley, I appreciate you adding that little nugget of good news to the parade of horrors that you just presented. Just so I'm clear, this did make it to the job killers list. Is there any higher ranking we can get this?

Ashley Hoffman ([13:12](#)):

Very carefully, every year, we comb through all the bills. We decide which bills we think would have the most negative impact on the business community and cause the most job loss. We actually ran some economic analysis on that and how many jobs exactly we thought would be lost for some of our job killers this year. It was on that list but again, once we got that piece taken out in the assembly, about publishing individual company's reports, we did just downgrade to an opposed position.

Ryan Bykerk ([13:40](#)):

Got it. I just wonder if you could tell us a little bit, just to expand on 1162 a little bit, what's each side's rationale there? I think we can kind of understand where Cal Chamber's coming from just because we're defense side attorneys, but can you talk a little bit about each side's rationale? What's driving the bill itself?

Ashley Hoffman ([14:02](#)):

The proponents are concerned about the wage gap, which I think we can all agree exists, and how do we address that. Their thought is we should put as much information about what people are being paid, out for the world to see. Our concern really, with those DFEH pay data reports, is what does it actually show versus what are you holding it out as showing. Those reports make you categorize your workers into, I think it's 10, very broad job categories. As broad as "professionals". From there, you break everyone down within the category into different race and gender combinations and you say the number of people who fall into different salary ranges. What that means is, like at a hospital, professionals includes nurses, it includes senior attorneys, it includes a brand new HR person... You are comparing people whose jobs really have nothing to do with each other and on top of that you're also, even for people arguably who are doing a similar job, you are not able to show in that report differences justified by education, experience, et cetera.

A lot of the messaging around this bill... Our concern was if a company comes out and it looks like, on paper, a certain group of professionals are not paid as another, it's going to be held out in the media, in litigation, in the legislature as proof of discrimination when that's not actually what it shows. That's really what we were kind of hammering home on and ultimately were successful in getting that piece of the bill removed.

Philip Person ([15:48](#)):

Got it. That makes a lot of sense. The way you presented SB 1162 is going to have a lot of changes to the status quo if it's passed. What other proposed legislation should employers be aware of?

Ashley Hoffman ([16:01](#)):

I mentioned a couple others. The two I mentioned before. Also, SB 1044 had been one of our job killer bills. The bill originally just plainly said if a worker feels unsafe at work, they can walk off the job or they can not show up. We had a lot of concerns about the breadth of that, especially considering it had no exemptions. You can't just have an emergency room team walking away, or folks who we depend on otherwise in times of emergency, if that's to... I don't know. Deal with an energy issue or a wildfire, what have you. We also wanted to make sure that it took into account existing health and safety regulations, which obviously had been very thoroughly vetted by Cal/OSHA, so we were able to get very considerable amendments.

It took a long time but we were able to get a lot of amendments, so we ended up removing opposition from that bill. Do expect that... I think it just passed so it is headed to the governor's office. I think that's really kind of if for a lot of the employment measures. There's an Ag specific bill that we have a lot of concerns about, involving card check for purposes of unionization but again, a very industry specific... Which is a trend that we are starting to see a lot. Is that instead of these big broad proposals, that you are starting to see very industry specific bills.

Ryan Bykerk ([17:32](#)):

When you are working through some of these bills, like 1162 or... You mentioned the FAST Act earlier, right? That's something to watch. Are you able to get a sense of, "Man, this one's going to go. This one's

not going to go," and if so, do you have some predictions, like a scorecard, to give us odds on these different bills?

Ashley Hoffman ([17:52](#)):

It's a fascinating process because sometimes I think, "Oh, of course people are going to vote for this," and then it won't pass. It's just weird. You know?

Philip Person ([18:02](#)):

Yeah. Okay.

Ashley Hoffman ([18:03](#)):

It's hard. We're at the end. They must pass all the bills by midnight next Wednesday, so the end of the month. At this point I would say 257, 2183, which is that ag card check bill, those are probably the ones that it's unclear. They're actually both in the hands of the Senate right now. The Senate has adjourned, which means that they will not take these bills up until next week. The fast food bill is going to get some significant amendments, which will be interesting to see. Sometimes that can sway people who may have felt a certain way.

It's fascinating, but the other ones at this point have at least made it through the second house. 1162 not quite yet, because they just took some technical amendments so it won't be eligible until next week, but I would probably expect it to pass. I would say 257, 2183, are really the ones that we're not sure what's going to happen in the last couple of days but the other ones are already heading to the governor's desk or likely about to be because once you passed your second house... It's very rare that the original house is not going to just concur in the amendments that were taken. Usually once you pass the second house, you're pretty good to go and you're on your way to the governor.

Ryan Bykerk ([19:26](#)):

Got it. That's absolutely fascinating. There needs to be probably a more detailed follow up to schoolhouse rock that would explain this to... It's very good to hear how these laws pass through and become laws, I guess. These proposals end up becoming laws. Thank you for that, Ashley. We really appreciate it.

I think it's about time to wrap up this episode, but as you may know Ashley, we always ask all of our guests for a crazy employment story. We know that you've litigated employment, you have been in this space. You have to have a crazy employment story, so we would just absolutely love to hear one if you have one.

Ashley Hoffman ([20:07](#)):

Yeah, a lot of stories. I think one of the crazy ones is, I had a case that involved... It was taking place in a very small town. Very small town. There were kind of a lot of players in it and it just became very clear that this had nothing to do with the workplace. The claims. It really was that you just had a lot of characters in this town who did not get along.

There was allegations of people spying on each other with security cameras at their houses. There was allegations of people going and digging on other people's property. There were allegations of people being in love with other people and jealousy of stuff. There was allegations that someone had left threatening notes and things on their porch. I just remember every deposition, every thing,

something new would come up that again really had nothing to do with the actual claims that were being made or anything.

It could have been a TV show of small town drama. It was very amusing and it went on for years. The case just moved slowly. It was I think still... I don't even remember what happened as far as resolution. It took years.

Philip Person ([21:35](#)):

That's because everybody was amazed by the allegations. I've seen movies and read books and had less interesting plots of that.

Ashley Hoffman ([21:46](#)):

That one was always fun. Every time we would get a thing of discovery, it was just a lot... So much of it had nothing to do with the case and people would write on it, like "This shows X, Y, Z," and I was like, "Who wrote this?"

Ryan Bykerk ([22:06](#)):

It's always interesting. That's why we love employment. There's always so many good stories.

Ashley Hoffman ([22:11](#)):

Yeah.

Philip Person ([22:13](#)):

Well Ashley, thank you again for joining us on this episode and to our listeners, if you have any other crazy employment stories, any other topics, anything else you want Ryan and I to cover, feel free to email us at theperformancereview@gtlaw.com

Otherwise, we'll see you next time.

Speaker 1 ([22:49](#)):

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