

California's Unique Worker Law Under Attack by Business Group

By Robert Iafolla

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- Private Attorneys General Act claims get around class action waivers
- Business group says law violates state and federal constitutions

Mortgage lender Guaranteed Rate Inc., tea and coffee importer Royal Cup Inc., and a subsidiary of CIGNA Holdings Inc. are some of the businesses that have been hit in the first weeks of 2019 with claims brought by California workers deputized to sue on the state's behalf.

California's unique Private Attorneys General Act allows workers to step into the shoes of a state enforcement agency and represent other workers hurt by alleged labor law violations. Although similar in ways to class actions, PAGA claims aren't subject to employment contracts that include agreements to resolve disputes only in individual arbitration.

But companies operating in California won't have to worry about PAGA if a business group prevails in a constitutional challenge to the law. The California Business & Industrial Alliance filed a lawsuit late last year in state court arguing that PAGA, intended to encourage private enforcement of labor laws, has become a "tool of extortion and abuse" that allows "greedy and unscrupulous plaintiffs' attorneys to shake down California employers."

Known by some critics as the "plaintiffs' attorney get around," PAGA is infamous in California's management bar for its invulnerability to class-action waivers and its power to turbo-charge settlements and verdicts. Walmart recently paid \$65 million to settle claims alleging the company didn't comply with a state requirement to provide workers with suitable seating in what's thought to be the largest PAGA settlement ever.

CABIA's lawsuit alleges that the act violates the California and U.S. constitutions in several ways. The law runs afoul of constitutional due process guarantees, for instance, by imposing penalties or extorting settlements that are "grossly disproportionate" to any wrongdoing committed, the alliance said. Those penalties also violate the constitutional prohibitions on excessive fines, the group said.

The odds, however, appear stacked against the lawsuit. California courts have treated PAGA kindly, highlighted by a series of decisions that have expanded the law's utility to plaintiffs. State courts have said PAGA claims aren't subject to normal class-action requirements and that plaintiffs can seek penalties for labor code violations that didn't actually harm them.

Ultimate Audience: U.S. Supreme Court?

CABIA's lawsuit advances some "out there" legal theories, said Catherine Fisk, a law professor at the University of California, Berkeley.

"We haven't seen a successful substantive due process challenge to an economic regulation since 1937," Fisk told Bloomberg Law. "The lawsuit is an invitation for judicial activism, presumably to get the U.S. Supreme Court to strike down PAGA because the California Supreme Court has upheld it."

Paul DeCamp, who represents CABIA, said the group and its lawyers are optimistic about getting a favorable ruling from a California court on one or more of the lawsuit's constitutional claims. But the U.S. Supreme Court would be the "ultimate arbiter" of the lawsuit's federal claims, said DeCamp, an attorney with Epstein Becker & Green.

"We're hopeful this case tells enough of a compelling factual story that the courts will recognize the unfairness of the statute and declare it unconstitutional," DeCamp told Bloomberg Law.

Lawsuit's PAGA Story

Beyond arguing that PAGA is unconstitutional and has been construed past the legislature's intent through court interpretations, the 54-page complaint demonstrates how the law can be used to boost an employer's financial exposure for violations by orders of magnitude over the actual damages.

It also names charitable companies that have been hit by PAGA lawsuits, and identifies litigious worker-side law firms that have most frequently filed PAGA notices.

Kingsley & Kingsley ranks as the second most aggressive PAGA firm, with nearly 600 notices filed, according to the complaint. Firm co-founder Eric Kingsley told Bloomberg Law that the law plays an essential role in the enforcement of California's labor laws, protecting workers and ensuring a level playing field for businesses.

"Lawyers bringing PAGA claims should be lauded, not demonized," Kingsley said.

Politics of PAGA

The lawsuit "seems like a political challenge," said Michael Rubin, an attorney with the worker-side law firm Altshuler Berzon. Many California businesses are concerned about the state Supreme Court's 2014 ruling that prevents PAGA claims from being forced into individual arbitration, so CABIA can show its members that it's fighting in court, Rubin told Bloomberg Law.

The lawsuit also comes as lawmakers in a handful of states are contemplating whistleblower legislation modeled in part on PAGA, especially in light of the Supreme Court's 2018 ruling blessing the use of class-action waivers in employment contracts.

Legislators in as many as six states could introduce PAGA-like bills this year, including New York, Oregon, Vermont, and Maine, according to Rachel Deutsch, an attorney with the Center for Popular Democracy, a left-leaning advocacy group.

Deutsch, who works with state-level coalitions to promote stronger labor laws, said there's particular interest in legislation that boosts enforcement in states that have passed new measures to help workers, such as increased minimum wages.

"Policymakers understand that those legislative advances will be meaningless," Deutsch told Bloomberg Law, "if they can't figure out how to provide real enforcement capacity."

-- With assistance from Jon Steingart

The case is California Business & Industrial Alliance v. Becerra, Cal. Super. Ct., 30-2018-01035180, Complaint filed 11/28/18.

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