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California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations



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UCLA Labor Center



I. INTRODUCTION

More than a century ago, before there was a national legislative consensus around paying workers a fair day's wage, California took the lead to establish minimum wage and working conditions for workers.¹ Since then, the state has remained a national standard bearer, enacting laws that help workers recover stolen wages, access paid leave from work, and enforce safe and humane working conditions.

However, these rights fail to deliver economic security to working Californians unless accompanied by strong enforcement mechanisms. Workers lose an estimated \$15 billion in minimum wage violations alone every year² — far more than retailers lose to shoplifting.³ In just three cities, Chicago, New York, and Los Angeles, workers lose an estimated \$56.4 million *per week* to wage theft violations when employers fail to pay minimum wage and overtime or provide meal and rest breaks.⁴

In addition, with the rapid expansion of forced arbitration by employers, workers' ability to pursue justice in court through class-action lawsuits has been severely undercut. Two-thirds of non-union workers in California have already lost the right to sue, and the number is projected to grow.⁵ In this context, it is critical that the state has adequate capacity to investigate, prosecute, and monitor employers who skirt the law.

Fortunately, when California enacted the Private Attorneys General Act ("PAGA") in 2003, the state established an innovative model for enforcing workplace rights — a model that other states are now considering.⁶ The Private Attorneys General Act allows workers to bring a representative action in the name of the state and recover civil penalties for violations of the California Labor Code, even if they've signed a forced arbitration agreement. These cases also allow the state to collect millions of dollars in penalties from lawbreaking employers who would otherwise profit from exploiting workers. As this report details, in 2019, **the state collected over \$88 million in PAGA penalties.**

Through new data supplied by California's Labor & Workforce Development Agency (LWDA), as well as assessments of practitioners, this brief explores PAGA's impact on California's workforce. While some employer-backed lobby groups have articulated strong concerns about PAGA, we find no evidence of a negative effect on the economy or a flood of frivolous litigation. Instead, PAGA has boosted the economy by helping California workers, especially those workers most vulnerable to workplace exploitation, fight wage theft. PAGA has demonstrably enhanced Labor Code compliance among employers, built enforcement capacity among state agencies, and ensured that violations of the law have a meaningful remedy.

II. BRIEF HISTORY OF THE PRIVATE ATTORNEYS GENERAL ACT

A. BACKGROUND

California leads the way when it comes to workers' rights. Paid sick leave; strong anti-retaliation and fair chance hiring laws; an eventual \$15 minimum wage for all workers, including tipped and agricultural workers; individual and joint liability for unpaid wages; and an administrative agency where workers can recover back pay without an attorney — these are just a few of the rights that make California's labor code the envy of workers and their advocates in other states.



Some of these laws enable workers to vindicate their rights by bringing a civil lawsuit on their own, for example, to recover withheld overtime wages.⁷ However, other laws, such as those preventing employers from stealing tips or requiring that employers provide paid sick leave, *can only be enforced* by state authorities and not by individuals suing in court.⁸ Some of these laws, in addition to providing remedies aimed at injured workers (e.g., requiring back pay or access to sick leave), also include civil penalties designed to deter future violations.

Yet, there was a fundamental mismatch between these rights as they existed on paper and the tools available to enforce workplace standards. For example, while California’s workforce nearly doubled from 1980 to 2000,⁹ the state’s main enforcement body stagnated, resulting in a 36 percent reduction in the ratio of enforcement staff to workforce.¹⁰ This meant that worker-protective laws remained unenforced, since trained investigators were not available to issue citations.

Meanwhile, workers lacked the legal power to sue to enforce many of their rights, and had no authority to collect civil penalties.¹¹ Workers of color, women, immigrant workers, and low-wage workers remain particularly vulnerable to wage theft and hazardous conditions.¹² For example, low-wage immigrant workers in Los Angeles experience minimum wage violations at twice the rate of their U.S.-born counterparts, and those in the Latinx community overall nearly four times as often as white workers.¹³

Recognizing the state’s dearth of enforcement power,¹⁴ California enacted the Private Attorneys General Act (“PAGA”) in 2003 to reduce noncompliance with the state’s labor laws and chip away at “unlawful and anti-competitive business practices.”¹⁵ The law achieves this effect by allowing an individual worker to file a civil lawsuit in the name of the state (a so-called “qui tam” action) to recover civil penalties for violations of the Labor Code experienced by the worker and other similarly situated employees.¹⁶

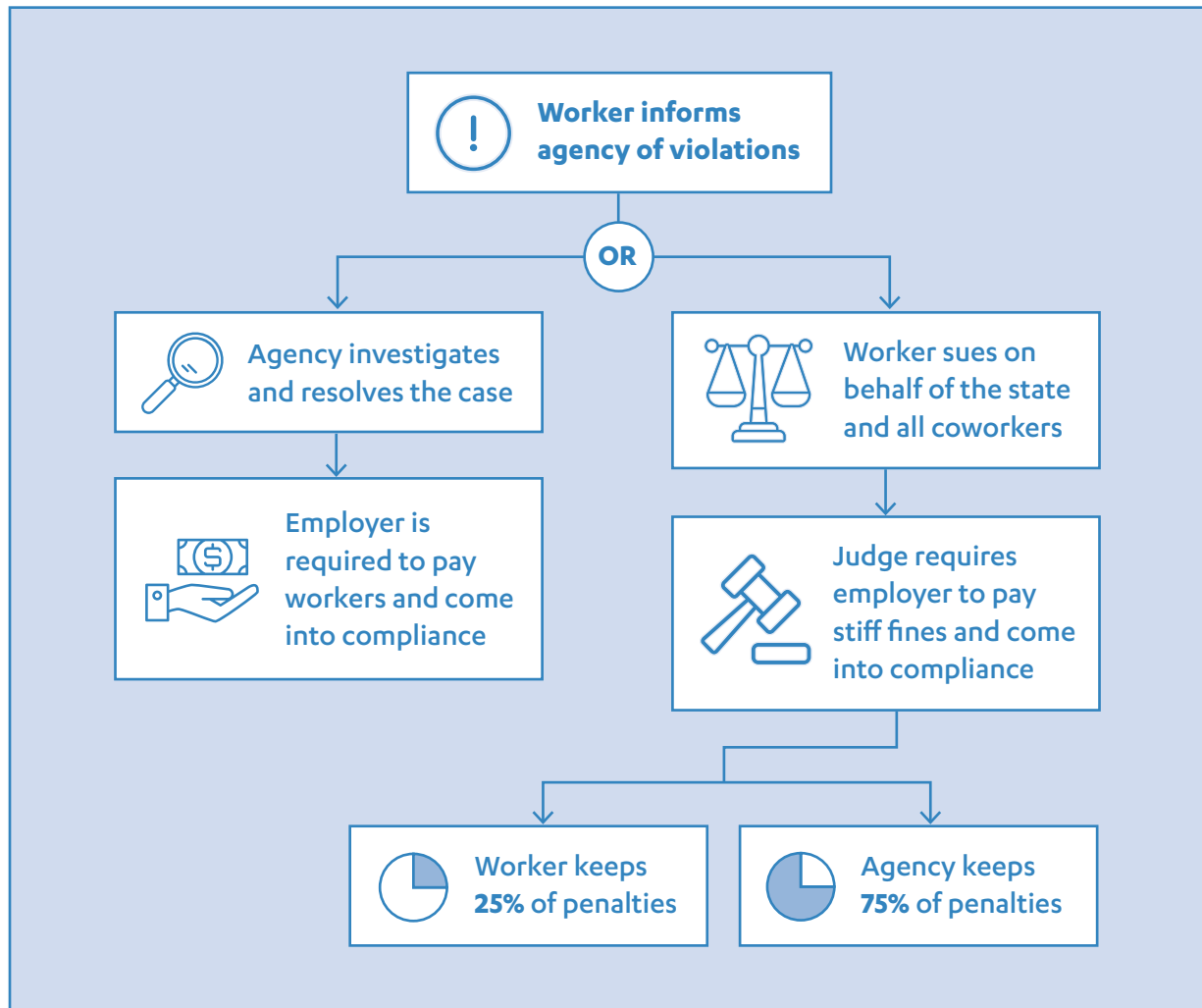
B. PROCESS FOR BRINGING A PAGA CLAIM



Before workers can initiate a civil action through PAGA, they are required to file their claim with the Labor and Workforce Development Agency and pay a filing fee.¹⁷ Within 65 days, the LWDA may agree to investigate and prosecute the alleged violation, or, alternatively, give notice of their intent not to investigate or cite the employer, which authorizes the worker to begin a civil action.¹⁸ For certain violations, the employer has a 33-day window to cure the violation and avoid an enforcement action.¹⁹

To ensure that PAGA provides effective remedies for the most vulnerable workers, the legislature created special oversight. If the case goes to trial, the parties may settle the claim only with court approval and after the LDWA has had an opportunity to review and comment on proposed settlements.²⁰ If workers are successful, they may be awarded attorney’s fees as well as 25 percent of all civil penalties assessed.²¹ The remaining 75 percent of the civil penalties awarded are remitted to LWDA for ongoing enforcement and public education efforts (see Figure 1).²²

Figure 1: Under PAGA, the Agency Investigates or Permits Workers to Pursue Action



PAGA Puts Money Back In the Pockets of the Most Vulnerable

The California Rural Legal Assistance Foundation serves farm workers and low-wage rural workers regardless of immigration status. They estimate that they and other rural legal services organizations have filed more than a hundred PAGA lawsuits since the law's passage and have assisted their clients to recover millions of dollars in cases involving egregious wage theft.²³ For example, four landscape workers in Stockton, California filed a PAGA suit because their employer refused to permit rest breaks, cheated them of pay, and required them to work in extreme heat without safety precautions.²⁴ The suit, filed on behalf of their 58 coworkers, resulted in recoveries of up to \$8,200 for each worker.²⁵ In an industry notorious for abusing vulnerable workers, this type of relief would be unimaginable without the ability to bring actions collectively to recover significant statutory and civil penalties.

III. IMPACT OF PAGA

In the years since PAGA’s enactment, employer associations have consistently attacked the law as a “job killer” that unfairly penalizes businesses for minor violations of law and floods the courts with meritless lawsuits. Yet there has been little analysis of that characterization, nor of PAGA’s role in improving working conditions or increasing employer compliance.

Newly available data shows that PAGA is primarily used to fight wage theft, and has had a considerable and positive impact for workers by deterring violations through a relatively small number of high-impact suits. The legislature has modified the law in response to employer concerns by focusing its attention on bad actors. In addition, policymakers have rejected many proposed amendments that would have radically altered the statutory scheme. The new data confirms the legislature’s wisdom in preserving PAGA’s essential functions intact.



A. PAGA EXPANDS ENFORCEMENT CAPACITY BY TAPPING THE EXPERTISE OF PRIVATE ATTORNEYS AND INCREASING CALIFORNIA LABOR CODE COMPLIANCE

As described above, PAGA's purpose was to ensure the robust and continuous monitoring of labor code violations that could not be identified and rectified through state enforcement alone. Private attorneys can build stronger factual records through more extensive direct contact with workers, increasing the success of litigation. Indeed, this model — enlisting an expert bar of private attorneys to serve the state's interest — is used by the federal government to enforce the False Claims Act, with 92 percent of revenues under that statute originating from claims brought by private parties.²⁶ Empirical analysis of over 4,000 *qui tam* suits shows that private attorneys are better at screening meritorious cases and that their expertise minimizes enforcement costs.²⁷

PAGA changes the enforcement landscape by dramatically increasing the likelihood that an employer faces serious consequences from exploiting its workforce. The most significant PAGA judgments and settlements address systemic violations by large low-wage employers, including Bank of America, Walmart, Rite Aid, Target, Virgin America, and CVS.²⁸

PAGA also adds a default penalty for Labor Code violations that previously carried no penalty, and which employers had therefore ignored.²⁹ For instance, advocates have used PAGA to enforce a workers' right to a seat if compatible with their work duties. Employers had flouted this law for decades, forcing cashiers and bank tellers to stand in place for hours. But, since PAGA's enactment, employers that failed to provide suitable seating have faced significant penalties.³⁰

These penalties have helped to shift California's corporate culture toward compliance, as evidenced by attorneys and human resources advisors who strongly urge employers to invest in following the law. Specifically, these advisors point to areas of the Labor Code that govern working conditions, but may not be as obvious as a minimum wage or overtime violation, such as seating requirements or paystub reporting.

As one lawyer noted, "in light of [PAGA], employers should be preemptive in aggressively attempting to identify potential bases for claims against them of *nonmonetary California Labor Code violations*, and once identified, those issues should be quickly remedied."³¹ Another article advises, "[e]mployers need to regularly audit their practices for compliance . . . For example, employers should . . . ensure that they are providing meal and rest breaks, paying employees the required penalties if breaks are missed, and recording the penalty payments on wage statements."³²

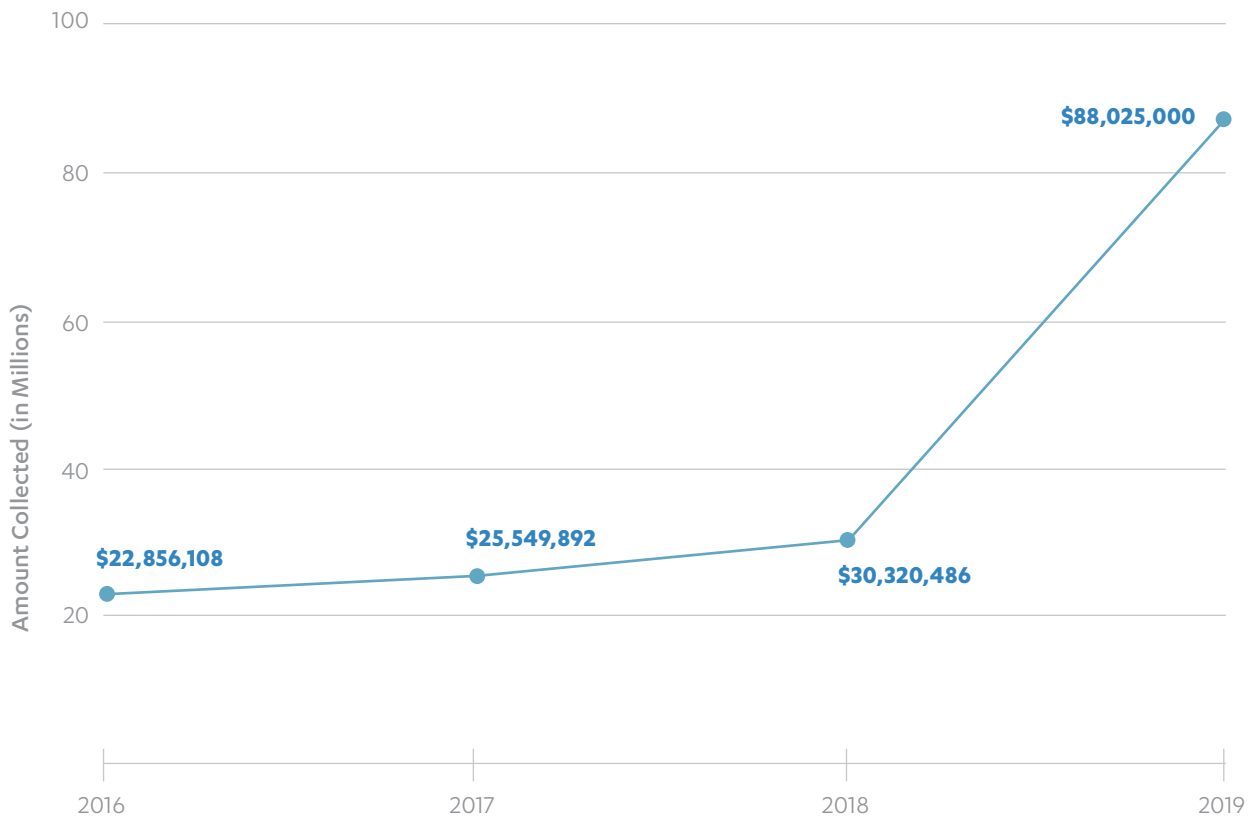
B. PAGA STRENGTHENS CALIFORNIA'S LABOR AGENCY AND ITS ENFORCEMENT EFFORTS

Through PAGA, California also gains vital funding to conduct independent investigations, as well to launch public education campaigns to encourage workers to come forward with evidence of Labor Code violations. This funding comes from the requirement that successful litigants remit 75 percent of the civil penalties collected to the LWDA, along with a smaller portion from the \$75 administrative fee that accompanies every PAGA notice.³³ For example, the first "suitable seating" case for workers forced to stand for the duration of their shifts — brought against Bank of America — resulted in a settlement that

generated \$10 million for the LWDA.³⁴ The agency used those funds to hire nine additional personnel, increasing the state’s enforcement capacity.³⁵

Newly available data shows that PAGA has transferred significant sums from lawbreaking employers to the state; and the annual recovery is steadily increasing. In 2019 alone, **PAGA generated over \$88 million in civil penalties for California’s LWDA.**³⁶ Over the last four years, the agency has recovered an annual average of **\$42 million** in civil penalties and filing fees (see Figure 2),³⁷ all statutorily allocated to enhance education and compliance efforts.³⁸

Figure 2: PAGA Penalties Collected, 2016-2019³⁹



These revenues have enhanced the state’s enforcement efforts by funding a wide variety of programs, including:

- Adding 13 staff devoted to cracking down on companies that fraudulently misclassify employees as independent contractors to avoid minimum wage, unemployment insurance, and other basic obligations to workers;
- A bilingual media campaign about workers’ rights under California’s Heat Illness Prevention regulations;

- A seven-language media campaign about wage theft that included instructional videos, pamphlets, and billboard, bus, and radio ads; and
- A program to disqualify employers that violate state prevailing wage laws from bidding on public contracts.⁴⁰

In recent years, the California Department of Labor Standards Enforcement (DLSE) has expanded staffing of its PAGA oversight unit to review notices and select cases to investigate and resolve internally. According to the DLSE, **“PAGA notices have proven to [generate] high quality leads identifying serious violations that in many cases would otherwise have remained underground.”**⁴¹

For example, a PAGA notice submitted by private attorneys prompted the LWDA to develop a criminal referral for an employer’s willful misclassification of pest control workers. The employer paid workers a flat rate for 14-hour work days — in violation of the California’s overtime laws — and required them to work in hot, cramped conditions. The agency ultimately issued a citation for over \$4 million.⁴²

C. PAGA PROTECTS WORKERS’ RIGHTS AND COLLECTIVE ACCESS TO REMEDIES

In addition to supplementing enforcement resources and changing compliance culture around many previously disregarded workplace rights, PAGA has become one of the few remaining avenues for workers to assert their rights collectively and in a public forum.

As researchers have detailed, forced arbitration has eroded worker access to courts and left them at the mercy of a system of privatized justice.⁴³ Employers are able to write the rules regarding how and when claims can be asserted.⁴⁴ Many times these companies then partner with arbitration providers who have every incentive to rule in the employer’s favor or, when there is unmistakable harm, provide far weaker remedies than workers would otherwise get in court.⁴⁵ Not only has this practice been ratified by the U.S. Supreme Court — which has struck down laws that have sought to reverse the use of forced arbitration⁴⁶ — they have expanded its reach by making it lawful for an employer to require that an employee litigate their claim in arbitration alone, and not as a class.⁴⁷

In California, mandatory employment arbitration has grown because of these Court rulings. The Economic Policy Institute has found that the use of mandatory arbitration in employment contracts is higher in California than the national average — **in 67 percent of state employment contracts compared to 54 percent of contracts nationally.**⁴⁸ And researchers predict an overall national growth in mandatory arbitration, given its demonstrated ability to deter claims and lower liability for employers.⁴⁹

However, PAGA has provided workers with the tools to continue litigating representative actions in court, due in part to favorable decisions from the California Supreme Court. The court has held that since a litigant is prosecuting their claim in the name of the state - which is not a party to the private arbitration contract - and collecting penalties only the state can collect, the claim cannot be compelled to private arbitration and is not preempted by the Federal Arbitration Act (FAA).⁵⁰

PAGA is the Only Recourse for Millions of Californians

Paige Allen and Eboni Foster worked at a Valero refinery in Benicia. They and their coworkers alleged that Valero failed to pay full wages, provide rest or meal breaks, or promptly provide final checks upon termination.⁵¹ The workers also sought compensation for the time each day spent traveling to their worksites in company vehicles and donning safety equipment, which often stretched their workdays to over 10 hours.⁵²

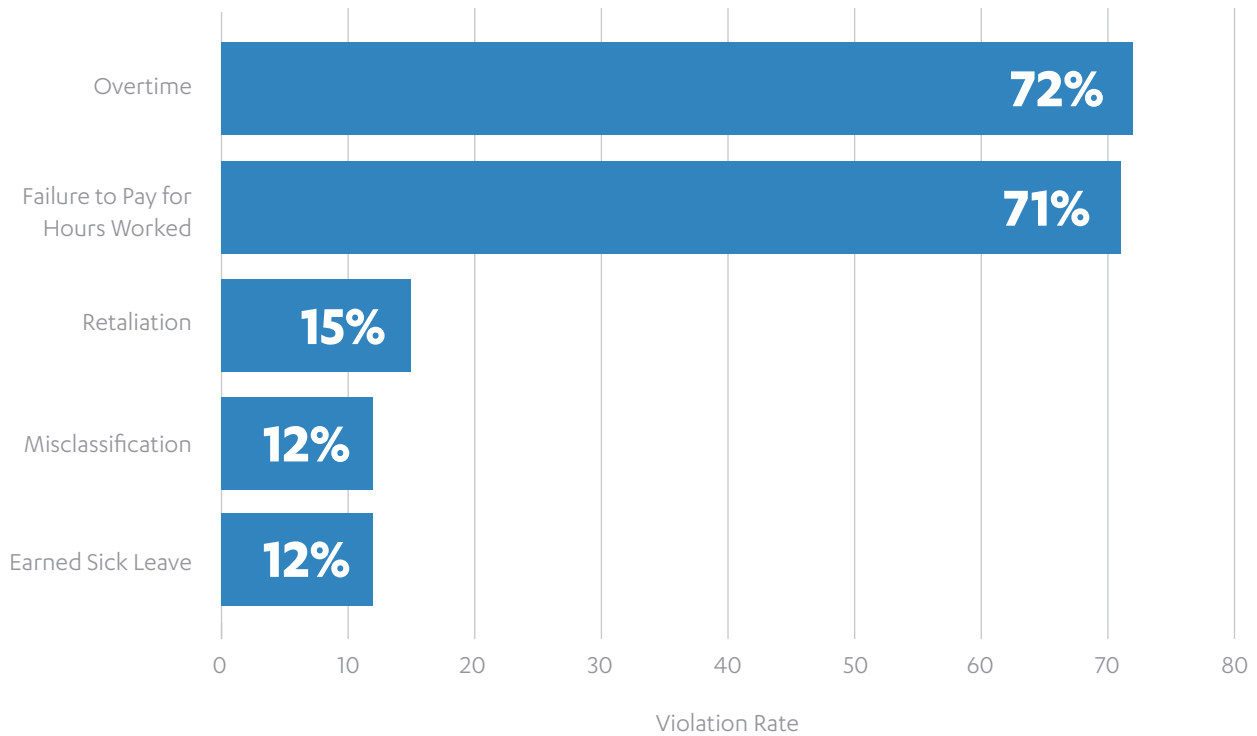
Valero had forced its employees to sign an arbitration clause that would have kept these claims from proceeding collectively in court.⁵³ However, when their attorneys included PAGA claims in their complaint, the employer decided not to enforce the arbitration clause and began settlement negotiations.⁵⁴ Through the use of mediation, the plaintiffs were able to secure a \$375,000 class-wide settlement, an amount that would likely have never been achieved in individual arbitration and which was secured because the employer feared facing liability under PAGA if the claims advanced.⁵⁵

D. THERE IS NO EMPIRICAL SUPPORT FOR EMPLOYER’S CLAIMS THAT PAGA HAS A NEGATIVE IMPACT ON CALIFORNIA’S ECONOMY OR COURT SYSTEM

Employers have characterized PAGA as a “job killer” that increases the cost of doing business in California, driving businesses out of state. Opponents further claim that the law “clog[s] already overburdened courts” with “meritless claims,” and that the statute is primarily used to impose penalties in response to minor violations resulting from innocent errors by employers.⁵⁶ **These critiques of PAGA have not been accompanied by empirical evidence.**

Indeed, new data shows that, rather than targeting employers for innocent errors that do little harm, most PAGA suits take aim at serious violations with severe consequences for working families. **Nearly nine out of ten (89 percent) PAGA claims allege wage theft**, including overtime violations (72 percent of cases) and failure to pay for all hours worked (71 percent of cases).⁵⁷ A smaller but still significant share involved violations of earned sick leave rights (12 percent), fraudulent misclassification of employees as independent contractors (12 percent), and retaliation (15 percent) (see Figure 3). As discussed below, employers have rarely taken advantage of new legislative procedures designed to allow employers acting in good faith to quickly resolve minor errors.

Figure 3: Types of Violations Alleged in PAGA Notices, Sept. 2016–Jan. 2020



In addition, the common criticism that PAGA is a “job killer” is at odds with California’s robust economic growth following PAGA’s enactment. Since 2006, California’s per capita income has risen from \$42,088 (ranking 10th in the nation) to \$63,557 in 2018 (6th nationally).⁵⁸ In recent years, California’s job growth has been stronger than the national average.⁵⁹ An economic analysis shows that California’s gross domestic product (GDP) grew by 17.2 percent between 2011 and 2016, a period in which it enacted 51 statutes characterized as “job killers” by the California Chamber of Commerce; by comparison, the average GDP growth in states with policies characterized as “business-friendly” was 9.8 percent.⁶⁰ In 2019, job growth accelerated in California while slowing in the rest of the country.⁶¹

Nor have PAGA suits added significantly to the caseload of state courts. Less than half of PAGA notices filed with the LWDA result in civil complaints.⁶² **In 2018, 774,202 civil cases were filed in California’s courts; of those only 2,104 — or 0.27 percent of the total — were PAGA cases.**⁶³ On average, courts issue less than 700 orders and judgments in PAGA cases each year, while over twice that many cases are settled with judicial approval.⁶⁴



IV. LEGISLATIVE REFINEMENT AND INCREASED AGENCY OVERSIGHT

Since enacting PAGA, the legislature has periodically refined the law to ensure that the focus is on deterring bad actors. In 2004, the legislature passed Senate Bill 1809 that redirected PAGA penalties to ensure that the LWDA received all of the state’s penalties for education and enforcement (in the original iteration of the PAGA statute, half of the recovered PAGA civil penalties went to the state’s general fund).⁶⁵ That same legislation made it clear that a PAGA action could not be brought for minor posting and notice violations of the employer.⁶⁶

PAGA was further amended shortly after passage to give employers an opportunity to “cure,” or correct, some labor code violations before a suit could be brought, by coming into compliance and paying workers any back pay or lost income. In 2015, the legislature added certain pay stub requirements to the list of curable violations.⁶⁷ The measure was intended to allow genuinely mistaken employers a chance to correct clerical errors on pay stubs before facing liability.⁶⁸

To take advantage of the cure provision, employers must provide evidence of having corrected the violation within 33 days, and may only take advantage of this safe harbor once in a year. The employee can also contest the validity of the cure.⁶⁹ These limitations, as well as the decision to allow the most serious violations to be litigated without notice-and-cure, ensure that the cure provision does not open a wide loophole that undermines the deterrent effect of PAGA.

Indeed, new data suggests that PAGA suits are not targeting employers for innocent errors. According to the DLSE, employers cured their violations in only 7 percent to 12 percent of the cases in which the option was available.⁷⁰ This data suggests that few employers sued under PAGA are eager to correct violations that are brought to their attention, and that the threat of penalties is therefore necessary to deter wage theft and other abuses.

Moreover, despite some calls for radical reform to the law, the legislature has declined proposals that would have made PAGA less effective.⁷¹ For example, the legislature considered and rejected measures that would have:

- Limited the number of Labor Code provisions to which PAGA applies;⁷²
- Allowed employers to avoid penalties by curing any violation, no matter how serious;⁷³
- Doubled the period of time for an employer to cure a violation;⁷⁴
- Capped the amount of civil penalties a worker could recover;⁷⁵
- Created a “harm-in-fact” standard that would make an employee prove significant economic or physical harm to bring a PAGA claim;⁷⁶ and
- Required LWDA to find a “reasonable basis” for the claims before a PAGA action could proceed, likely delaying the majority of cases.⁷⁷

While rejecting proposals to hamper or limit PAGA, the legislature has improved the enforcement tool by expanding the PAGA oversight unit within LWDA. This unit’s duties include reviewing notices that employees submit before filing a PAGA claim and determining whether to investigate internally; taking action on those cases investigated internally, such as citing the employer for Labor Code violations; and evaluating proposed settlements of PAGA litigation between employers and employees.⁷⁸ Beginning in 2020, the PAGA unit’s budget will increase to \$3 million annually, allowing it to more effectively evaluate notices to triage cases for investigation, as well as pursuing more cases through resolution.⁷⁹ Since the PAGA unit was established in 2016, it has settled nine cases and recovered over \$3.3 million in back-pay and over \$500,000 in penalties.⁸⁰

The legislature’s persistence in rejecting harmful proposals, as well as their careful tailoring when enacting reforms and gradual increases in agency staffing, bolsters the perspective that PAGA should remain a robust tool to ensure greater compliance with the state’s employment laws.

Fighting Pay Discrimination with PAGA

Lynne Coates, an attorney at Farmers Insurance, discovered that she was a victim of pay discrimination. Her less-experienced male colleague earned more than her, and an equally-qualified male colleague was being paid *twice* her salary. After complaining to her manager, Lynne was pushed out of her job. Lynne’s experience was part of a company-wide pattern of devaluing the skills and contributions of women. She and over 300 female Farmers employees brought a PAGA suit. Lynne and her coworkers recovered \$4 million and won key business practice changes. Farmers committed to update employment policies, provide annual diversity training, confirm that its compensation policies and procedures are not having a negative impact on female attorney employees, make salary range information available to its attorneys, refrain from discouraging employees from discussing their compensation, and increase the representation of women in higher salary grades. According to counsel Lori Andrus, the availability of PAGA penalties unquestionably contributed to Farmers’ willingness to agree to comprehensive monetary and injunctive relief.

V. CONCLUSION

In an age of increasing corporate concentration and rapidly growing economic inequality, PAGA has shifted power to California’s working people. Low-wage workers, immigrants, tipped workers, and other communities vulnerable to exploitation have particularly benefited from a legal mechanism that allows them to join together to demand accountability and bring their employer into compliance with the law.

As advocates and workers across the country navigate an uncertain legal landscape, states are looking to California’s experience to design their own *qui tam* laws. New York, Washington, Maine, Vermont, Massachusetts, and Oregon have all introduced bills inspired to help workers blow the whistle on corporate wrongdoing.⁸¹ These reforms, if adopted, could help replicate PAGA’s success in California for millions more workers, while investing in innovative strategies to promote compliance, such as partnerships with community-based organizations to educate workers about their rights and help them bring claims.

And in California, thousands of workers who are currently misclassified as independent contractors now have more avenues to challenge their status and vindicate their rights.⁸² Under the state’s newly adopted ABC test (effective since 2018 under *Dynamex Operations West, Inc. v. Superior Court*), employers who fail to establish their worker’s status as a genuine independent contractor will be required to treat their workers as employees.⁸³ Recent legislation has extended this test - which had applied only to the state’s Wage Orders - to the state’s Labor Code (including workers’ compensation coverage) and Unemployment Insurance Code (which, in addition to unemployment insurance coverage includes access to disability insurance and paid family leave).⁸⁴ Workers who have gained employment status will be entitled to bring PAGA cases alleging violations of the Labor Code.

In the meantime, the steady growth in PAGA revenue has helped LWDA keep up with the growth of California’s workforce and the expansion of legal rights, while deploying innovative strategies to ensure workers’ rights are respected. For instance, the Labor Commissioner’s office is currently partnering with 14 nonprofit organizations rooted in communities of low-wage workers to develop strategic enforcement plans for six high-violation industries.⁸⁵ And while forced arbitration erodes employer accountability across the country, PAGA’s stiff penalties ensures continued incentives for employers to follow the law. In light of its impact, PAGA is undoubtedly a central reason for California’s national leadership in expanding and enforcing workplace rights.



ENDNOTES

- 1 California established the Industrial Welfare Commission (IWC) in 1913, twenty-five years before the federal Fair Labor Standards Act (FLSA) was enacted. See *Martinez v. Combs*, 49 Cal.4th 35, 50, 53 (2010).
- 2 David Cooper and Teresa Kroeger, “Employers Steal Billions from Workers’ Paychecks Each Year”, Economic Policy Institute, 2 (May 10, 2017) available at <https://www.epi.org/files/pdf/125116.pdf>.
- 3 Amy Traub, “Wage Theft vs. Shoplifting: Guess Who Goes to Jail?” Demos Blog (June 13, 2017) available at <https://www.demos.org/blog/wage-theft-vs-shoplifting-guess-who-goes-jail>.
- 4 Annette Bernhardt et al., “Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities”, Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 6 (2009) available at <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.
- 5 Alexander Colvin, “The Growing Use of Mandatory Arbitration”, Economic Policy Institute, 7 (April 6, 2018) available at <https://www.epi.org/files/pdf/144131.pdf>; see also Kate Hamaji, Rachel Deutsch, and Elizabeth Nicolas, “Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back”, Center for Popular Democracy and Economic Policy Institute, Table 2 (2019) available at <https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.
- 6 See, e.g., S1848, 2019-201 (NY) Legislative Session, available at <https://www.nysenate.gov/legislation/bills/2019/S1848>; HB 1965, 2019-20 (WA) Legislative Session, https://app.leg.wa.gov/billsummary?_BillNumber=1965&Chamber=House&Year=2019; H.438, 2019-2020 (VT) Legislative Session, <https://legislature.vermont.gov/bill/status/2020/H.483>; S.1066, (ME) 191st Session, <https://malegislature.gov/Bills/191/S1066>; SB 750, (OR) 2019 Regular Session, <https://olis.leg.state.or.us/liz/2019R1/Measures/Overview/SB750>.
- 7 Cal. Lab. Code § 1194(a).
- 8 Cal. Lab. Code § 351; see *Lu v. Hawaii Gardens Casino, Inc.*, 50 Cal.4th 592, 595 (2010) (holding that the rights contained in section 351 do not give rise to a private right of action).
- 9 Tom Gallagher, “Tough on Crime? The Decline of Labor Law Enforcement in California 1970-2000” (June 2001) (copy on file with the McGeorge Law Review).
- 10 Paul Ong and Jordan Rickles, “Analysis of the California Labor and Workforce Development Agency’s Enforcement of Wage and Hour Laws”, The Ralph and Goldy Lewis Center for Regional Policy Studies UCLA (2004) available at <https://escholarship.org/uc/item/8r08m4x4>.
- 11 For example, researchers noted that based on low staffing levels in the state Department of Labor Standards Enforcement, it would take them “over 100 years to inspect each of California’s restaurants;” locations where advocates know wage theft and discrimination are rampant. See Ben Nichols, *Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code*, 35 McGeorge L. Rev. 581, 582 (2004). In addition, studies reported that health and safety inspections had fallen by 47 percent from 1980 to 1999. See Nancy Cleeland, “Study Cites Drop in Enforcement of Labor Laws,” Los Angeles Times (June 30, 2001) available at <https://www.latimes.com/archives/la-xpm-2001-jun-30-fi-16822-story.html>.
- 12 David Cooper and Teresa Kroeger, “Employers Steal Billions from Workers’ Paychecks Each Year”, Economic Policy Institute (2017) available at <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>.
- 13 Ruth Milkman, Ana Luz Gonzalez, and Victor Narro, “Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers”, Institute for Research on Labor and Employment UCLA, 42-43 (2010) available at <https://www.labor.ucla.edu/publication/wage-theft-and-workplace-violations-in-los-angeles/>.
- 14 See, e.g., Assembly Judiciary Committee, Committee Analysis of SB 796, 3-4 (June 26, 2003) (noting that employers had been able to “violate the [Labor Code] with impunity.”).
- 15 Cal. Lab. Code § 2698 *et seq.* See also S.B. 796, 2003-2004 Sen. Reg. Sess. (CA 2003); *Arias v. Superior Court* 46 Cal.4th 969, 980-981 (2009) (finding that PAGA was enacted to deputize private citizens to enforce the state’s Labor Code).
- 16 See Cal. Lab. Code § 2699; see also *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745, 761 (2018) (holding that an employee can pursue civil penalties for violations of the Labor Code affecting other employees, even if they did not experience the violation, since they stand in the shoes of the state).
- 17 Cal. Lab. Code § 2699.3(a)(1)(A)-(B).
- 18 Cal. Lab. Code § 2699.3(a)(2)(A)-(B). If the LWDA decides to investigate or cite the employer, that have up to 180 days to conduct that process and come to a decision. *Id.*
- 19 Cal. Lab. Code § 2699.3(c)(2)(A). Limited to three instances in any 12-month period, or once per year for certain paystub reporting violations. Cal. Lab. Code § 2699.3(c)(2)(B)(i)-(ii).

- 20 Cal. Lab. Code § 2699(l)(2)-(4).
- 21 Cal. Lab. Code § 2699(g)(1) (providing for attorney’s fees, costs, and filing fees); Cal. Lab. Code § 2699(i) (assigning the distribution of civil penalties).
- 22 Cal. Lab. Code § 2699(j).
- 23 Mark Schacht, Written testimony to the Vermont House of Representative Committee on Judiciary, March 31, 2018.
- 24 Rachel Deutsch, “Whistleblower Enforcement: Holding Corporations Accountable for Breaking the Law”, Center for Popular Democracy, 2 (2018) available at <https://populardemocracy.org/news/publications/whistleblower-enforcement-holding-corporations-accountable-breaking-law>.
- 25 *Id.*
- 26 U.S. Department of Justice, “Justice Department Recovers over \$3.7 Billion from False Claims Act Cases in Fiscal Year 2017” (press release), December 22, 2017.
- 27 David Freeman Engstrom, “Harnessing the Private Attorney General: Evidence from Qui Tam Litigation”, 112 Columbia Law Review 1244, 1289-90. (October 2012).
- 28 *Garrett v. Bank of America, N.A.*, Case No. 3:2013cv05263 (N.D. Cal. 2014); *Magadia v. Wal-Mart Associates, Inc.*, 384 F.Supp.3d 1058, 1111 (N.D. Cal., May 31, 2019); *Hall v. Rite Aid Corporation*, 226 Cal. App.4th 278 (2014); *Murphy et al. v. Target Corporation et al.*, case number 3:09-cv-01436 (S.D. Cal.), and *Thompson et al. v. Target Corporation*, Case No 2:16-cv-00839 (C.D. Cal.); *Bernstein v. Virgin America, Inc.*, Case No. 15-cv-02277-JST, *15 (N.D. Cal., Jan. 16, 2019); *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1 (2016).
- 29 Cal. Lab. Code § 2699(f). Though a court has the discretion to lower the maximum civil penalty awarded if the total amount were found to be “unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(e)(2).
- 30 See *infra* Section III(B).
- 31 Joshua R. Dale, “Power Continues To Flow toward Calif. Plaintiffs via PAGA”, Law360 (May 22, 2015) (emphasis added), available at <https://www.law360.com/articles/655387/power-continues-to-flow-toward-calif-plaintiffs-via-paga>.
- 32 Lisa Nagele-Piazza, “California Employers Face Significant Penalties for Pay Stub Violations”, SHRM (Feb. 7, 2018) available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-employer-penalties-pay-stub-violations.aspx>.
- 33 See *supra* Section II(B).
- 34 Michael Rubin, “Testimony to the House Committee on the Judiciary: H. 789, An Act Delegating Public Enforcement Powers to Private Attorneys General” (April 4, 2018).
- 35 *Id.*
- 36 Data provided by Michael Smith of DLSE to Michael Rubin of Altshuler Berzon, November 5, 2019; and by Mark Janatpour of the Department of Industrial Relations to Rachel Deutsch of Center for Popular Democracy, January 13, 2020, in response to a request under the Public Records Act.
- 37 *Id.*
- 38 See Cal. Lab. Code § 2699(j).
- 39 Authors’ analysis of data provided by Michael Smith of DLSE to Michael Rubin of Altshuler Berzon, in response to a request under the Public Records Act, November 5, 2019; and by Mark Janatpour of the Department of Industrial Relations to Rachel Deutsch of Center for Popular Democracy, January 13, 2020, in response to a request under the Public Records Act.
- 40 Data provided by Mark Woo-Sam, California LWDA, by email, December 10, 2018, to Michael Rubin of Altshuler Berzon in response to Public Records Act request.
- 41 Department of Labor Standards Enforcement, “Budget Change Proposal FY 2019-20”, 3 (2019) available at https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.
- 42 *Id.* at 4.
- 43 Kate Hamaji, Rachel Deutsch, and Elizabeth Nicolas, “Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back”, Center for Popular Democracy and Economic Policy Institute, 3 (2019) available at <https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.
- 44 See generally Jessica Silver-Greenberg and Robert Gebeloff, “Arbitration Everywhere, Stacking the Deck of Justice,” The New York Times (October 31, 2015) available at <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (a multi-part series demonstrating how employers write favorable rules and design internal arbitration systems to ensure beneficial outcomes regarding employment disputes).

- 45 *Id.* (documenting how employers, as repeat players in the arbitration business, benefit from private arbitrators who decide claims favorably for the employer in order to ensure recurring business and referrals). See also Katherine Stone and Alexander Colvin, “The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights,” Economic Policy Institute, 20 (2015) available at <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (documenting the lower win rates and smaller money judgments workers receive in arbitration compared to the same claims adjudicated in court).
- 46 See generally, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 594 (2013).
- 47 *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018); see also *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019) (holding that even an ambiguous arbitration clause can be construed to prevent a worker from arbitrating their claims on a class-wide basis).
- 48 Alexander Colvin, “The Growing Use of Mandatory Arbitration,” Economic Policy Institute, 7 (April 6, 2018) available at <https://www.epi.org/files/pdf/144131.pdf>.
- 49 Kate Hamaji, Rachel Deutsch, and Elizabeth Nicolas, “Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back,” Center for Popular Democracy and Economic Policy Institute (2019) available at <https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>. Estimating that by 2024, 80 percent of private-sector, non-union workers will be required to resolve their disputes in privatized, mandatory arbitration. *Id.* at 3.
- 50 See *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014); cf. *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015). But see *ZB, N.A. v. Superior Court*, 8 Cal.5th 175, 193-95 (2019) (holding that unpaid back wages cannot be collected as civil penalties under PAGA).
- 51 *Allen v. Summit Inspection Services, Inc.*, Case No. FCS050428 (Dec. 5, 2018).
- 52 *Id.*
- 53 Author’s email communication with plaintiff’s attorney (Dec. 5, 2019).
- 54 *Id.*
- 55 *Id.*; *Allen v. Summit Inspection Services, Inc.*, Case No. FCS050428, *2 (Dec. 5, 2018).
- 56 Senate Floor Analysis, SB 796, 7, 9/11/03. Assembly Committee On Judiciary, SB 796, 7, 6/26/03.
- 57 PAGA RLLV Report, provided by Mark Janatpour of LWDA to Rachel Deutsch of the Center for Popular Democracy, January 24, 2020. For purposes of this analysis, the authors considered the following violation categories to be “wage theft”: failure to pay minimum wage, failure to pay overtime, failure to pay for all hours worked, failure to pay wages upon termination, other unpaid wages, and tip violations.
- 58 U.S. Bureau of Economic Analysis, “Per Capita Personal Income in California,” Federal Reserve Bank of St. Louis (retrieved from FRED) (Dec. 19, 2019) available at <https://fred.stlouisfed.org/series/CAPCPI>; U.S. Bureau of Economic Analysis, “Release Tables: Per Capita Personal Income by State, Annual” (Dec. 19, 2019) available at <https://fred.stlouisfed.org/release/tables?rid=151&eid=257197>.
- 59 Sarah Bohn, Marisol Cuellar Mejia, and Julien Lafortune, “Economy: California’s Future”, Public Policy Institute of California, 1 (Jan. 2020) available at <https://www.ppic.org/wp-content/uploads/californias-future-economy-january-2020.pdf>.
- 60 Ian Perry, “California is Working: The Effects of California’s Public Policy on Jobs and the Economy Since 2011”, UC Berkeley Labor Center, 6 (Nov. 2017) available at <http://laborcenter.berkeley.edu/pdf/2017/California-is-Working.pdf>.
- 61 In California, Job Growth is Strong, but Nationally It’s a Different Story. <https://www.latimes.com/business/story/2020-01-24/la-fi-california-jobs-december>
- 62 Department of Labor Standards Enforcement, “Budget Change Proposal FY 2019-20”, 6 (2019) available at https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.
- 63 Judicial Council of California’s 2018 Court Statistics report: Authors’ analysis of data provided by Mark Woo-Sam, California LWDA, by email, December 10, 2018, to Michael Rubin of Altshuler Berzon in response to Public Records Act request.
- 64 Data provided by Michael Smith of DLSE to Michael Rubin of Altshuler Berzon, in response to a request under the Public Records Act, November 5, 2019.
- 65 Senate Bill 1809 (Dunn), 2003-2004 Reg. Sess. (2004).
- 66 *Id.*
- 67 Assembly Bill 1506 (Hernández), 2015-2016 Reg. Sess. (2015).

- 68 Assembly Committee on Labor and Employment, Committee Analysis of AB 1506, 3 (Sept. 8, 2015).
- 69 See Cal. Lab. Code § 2699(d) (considering the specified pay stub violations cured only by a showing that the employee has received accurate wage statements for three years); Cal. Lab. Code § 2699.3(c)(2)(A) (limiting cure period to 33 days); Cal. Lab. Code § 2699.3(c)(2)(B)(ii) (allowing an employer to avail themselves of the cure mechanisms for specified pay stub violations only once per 12 month period); Cal. Lab. Code § 2699.3(c)(3) (providing a complaint mechanism for the employee to challenge an employer's alleged cure attempt).
- 70 Department of Labor Standards Enforcement, "Budget Change Proposal FY 2019-20," *supra* note 60, at 6.
- 71 Contrary to weakening the law, lawmakers have sought to make it more rational. For example, the Legislature took care to provide a statutory definition of what constitutes "suffering injury" for purposes of recovering damages pursuant to the itemized wage statement claims by stating that it only applies where a reasonable person could not determine their rate of pay or hours worked. See Senate Bill 1255 (Wright) Reg. Sess. 2011-2012 (2012).
- 72 Assembly Bill 2461 (Grove) Reg. Sess. 2015-2016 (2016).
- 73 Assembly Bill 2462 (Grove) Reg. Sess. 2015-2016 (2016).
- 74 Assembly Bill 281 (Salas) Reg. Sess. 2017-2018 (2018).
- 75 Assembly Bill 2463 (Grove) Reg. Sess. 2015-2016 (2016).
- 76 Assembly Bill 2464 (Grove) Reg. Sess. 2015-2016 (2016).
- 77 Assembly Bill 2465/2065 (Grove) Reg. Sess. 2015-2016 (2016).
- 78 Indeed, the LWDA's power to review PAGA claims was strengthened when the legislature enacted Senate Bill 836 (Committee on Budget) which requires the plaintiff to provide a notice of the complaint and settlement to the Agency and giving the Agency additional time to review.
- 79 Department of Labor Standards Enforcement, "Budget Change Proposal FY 2019-20", 3 (2019) available at https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf.
- 80 *Id.* at 5.
- 81 Kate Hamaji, Rachel Deutsch, and Elizabeth Nicolas, "Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back", Center for Popular Democracy and Economic Policy Institute, 20 (2019) available at <https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.
- 82 See Assembly Bill 5 (Gonzalez) Ch. 296 (2018).
- 83 4 Cal.5th 903 (2018).
- 84 See Assembly Bill 5 (Gonzalez) Ch. 296 (2018).
- 85 Jennifer Lin, "California Strategic Enforcement Partnership," National Employment Law Project, et al. (2018) available at <https://s27147.pcdn.co/wp-content/uploads/CA-Enforcement-Documents-Letter-11-27-18-1.pdf>.



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