LAO

November 23, 2021

RECEIVED

NOV 23 2021

INITIATIVE COORDINATOR
ATTORNEY GENERAL'S OFFICE

Hon. Rob Bonta
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Anabel Renteria
Initiative Coordinator

Dear Attorney General Bonta:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative "The Fair Pay and Employer Accountability Act of 2022" (A.G. File No. 21-0027, Amendment No. 1).

Background

California Labor Law. The California Labor Code consists of laws that employers must follow with respect to employee wages, hours, breaks, and working conditions. For example, the Labor Code specifies the state minimum hourly wage, when employees must receive overtime pay, when meal and rest breaks must be provided, what information must be included on pay stubs, and what steps employers must take to provide a safe and healthy workplace.

Employers Who Violate Labor Laws Must Pay Any Unpaid Wages and Applicable Penalties. Common violations of the Labor Code include not paying overtime, failing to pay the minimum wage, delayed payment, and unreimbursed business expenses. Although employers are responsible for providing unpaid wages to employees when the employer has violated a wage law, some Labor Code violations also carry penalties that employers must pay (in addition to unpaid wages, if applicable). For example, there is a $250 penalty for each pay period the state's minimum wage is not met. These penalties are assessed by state agencies, typically paid to the state, and intended to improve compliance with labor law by making violations costlier for employers.

State Law Allows Employees to File Wage Claims With Labor Commissioner. One way employees may seek unpaid wages is by filing a wage claim with the Labor Commissioner's Office, which enforces state laws related to pay, hours, meal and rest breaks, employee classification, and payroll recordkeeping. (A separate state office enforces workplace health and safety laws.) Employees file around 30,000 wage claims each year. When an employee files a claim with the Labor Commissioner, staff hold an informal conference with the employee and employer to resolve the dispute. If it cannot be resolved informally, a formal administrative hearing is held and a final determination is made. Either party may appeal the final determination

Legislative Analyst's Office
California Legislature
Gabriel Petek, Legislative Analyst
925 L Street, Suite 1000, Sacramento, CA 95814
(916) 445-4656

to the courts. (For nonwage technical violations, such as incomplete pay stubs, employees cannot submit wage claims and therefore must directly file a lawsuit against their employer in court. They can also file a lawsuit against their employer for wage-related violations as an alternative to filing a claim with the Labor Commissioner.)

Private Attorneys General Act (PAGA) Allows Employees to Collect Labor Code Penalties. Prior to 2004, employees could seek unpaid wages from their employer by filing a lawsuit in court to recover the wages (as they still can today), but they could not seek additional penalties in these cases because only state agencies were authorized to assess penalties. This changed in 2004 when the state enacted PAGA, which allows employees to sue their employers to collect a share of penalties associated with the violations. (As discussed below, PAGA penalty revenues are shared between the state and the affected employees.) The intent of PAGA is to improve enforcement of the state's labor laws by offering an alternative to state-lead enforcement that could be used, for example, when the Labor Commissioner lacks the resources to enforce fully all alleged Labor Code violations.

PAGA differs from wage claims and traditional civil lawsuits in several other aspects:

- ***Lawsuits Proceed Only After State Declines to Investigate.*** Employees who wish to pursue a PAGA lawsuit against an employer must first notify the state of the alleged violation and their intent to pursue a lawsuit. If the state does not investigate or if the investigation does not lead to a citation, the employee may proceed with the lawsuit. The state receives around 5,000 PAGA notices annually. The state investigates a minority of these notices.
- ***Extends Penalties to All Other Labor Code Violations.*** PAGA allows employees to seek a penalty—$200 per pay period per violation—for each Labor Code violation that occurred, not just for Labor Code violations that carry a specified penalty under state law.
- ***Authorizes Representative Legal Action.*** Under PAGA, employees can seek penalties for violations that affected them personally and for violations that affected other employees. For instance, if the plaintiff was not adequately paid for overtime hours, he or she could represent other employees whose overtime hours also were underpaid. In this way, PAGA cases are similar to class-action lawsuits, where individuals join one lawsuit instead of filing separate suits. Unlike class actions, however, an employee who files a PAGA lawsuit may include in the lawsuit violations that he or she did not personally suffer but that were allegedly suffered by other, represented, employees.
- ***Penalties Split Between State and Employees.*** Unlike penalties collected by the Labor Commissioner, penalties paid under PAGA are distributed 75 percent to the state (to be used for labor law enforcement activities) and 25 percent to the affected employees.

Most PAGA Lawsuits Are Settled Before Trial. Few PAGA lawsuits go to trial. Instead, employees and employers typically reach a settlement agreement after initial legal proceedings have begun but before the trial begins. The settlement award typically includes a small penalty portion that is divided between the employees (25 percent) and the state (75 percent).

Proposal

Repeal PAGA. The measure repeals PAGA. To remedy labor law violations, employees would still be able to file wage claims with the Labor Commissioner's Office or file traditional lawsuits against their employer in court. Each worker would need to file a claim individually. Workers could not combine their claims into a class action.

New Penalties for Labor Law Violations. The measure creates new penalties for labor law violations where no penalty currently is provided in state law. This penalty is $100 per pay period for the first violation and $200 for additional violations. These penalties can be doubled if an employer intentionally violates the law. All of the penalties are paid to affected workers. Only the Labor Commissioner may enforce these penalties.

New Responsibilities for Labor Commissioner. The measure creates several new responsibilities for the Labor Commissioner. These new responsibilities include:

- Creating a team to consult with employers and employees about possible labor law violations.
- Creating a point of contact for public complaints about actions taken by the Labor Commissioner.
- Requiring the Labor Commissioner to be a party in all wage claims, including those where its decisions are appealed to the courts.

Full Funding Requirement. The measure requires the state to provide enough funding to the Labor Commissioner to fully carry out its new and existing responsibilities.

Fiscal Effects

Increased State Costs to Enforce Labor Laws. The measure likely would increase state costs for the Labor Commissioner as a result of:

- ***Increased Wage Claims.*** The measure likely would increase the number of wage claims received by the Labor Commissioner because some employees who would have been plaintiffs in PAGA lawsuits might instead file wage claims. Offsetting this somewhat, the Labor Commissioner would no longer need to review and investigate PAGA lawsuit notices.
- ***New Responsibilities.*** The measure creates a number of new responsibilities for the Labor Commissioner.
- ***Full Funding Requirement.*** The state may need to provide additional funding to the Labor Commissioner as a result of the measure's requirement to fully fund the Labor Commissioner's responsibilities.

Overall, the amount of increased state costs will depend on the way the state carries out the measure. However, state costs could exceed $100 million per year. These costs likely would be paid from increased state fees on businesses, which currently fund the Labor Commissioner, or from the state General Fund.

Reduced State Revenue From Elimination of PAGA Penalties. Under this measure, the state would no longer receive PAGA penalties, meaning the measure would result in reduced state revenue for labor law enforcement. This revenue reduction likely would be in the tens of millions of dollars annually.

Change in State Trial Court Workload and Costs. The measure would result in changes in state trial court workload, some parts decreasing workload and other parts increasing workload. Employees would no longer be able to file PAGA lawsuits in the trial courts, resulting in decreased workload for those types of cases. On the other hand, trial courts could receive an increased number of appeals of Labor Commissioner decisions or an increased number of class-action lawsuits or other civil filings that otherwise would have been pursued as PAGA lawsuits. Overall, the measure's effect on trial court workload and costs is unclear.

Summary of Fiscal Effects. We estimate that this measure would have the following fiscal effects:

- Likely increase in state costs to enforce labor laws that could exceed $100 million per year.
- Reduction in state penalty revenue used for labor law enforcement in the tens of millions of dollars annually.

Sincerely,

Carolyn Chu

for Gabriel Petek
Legislative Analyst

Karen Finkenberg

for Keely Martin Bosler
Director of Finance