

SENATE THIRD READING  
SB 646 (Hertzberg)  
As Amended August 30, 2021  
Majority vote

## SUMMARY

Excepts janitorial employees from the Private Attorneys General Act (PAGA) who are covered by a collective bargaining agreement that is in effect any time before July 1, 2028, and provided that agreement contains, among other things, a grievance and binding arbitration procedure to redress violations that could have been remedied under PAGA.

### Major Provisions

- 1) Excepts a janitorial employee from the provisions of PAGA if the employee is covered by a collective bargaining agreement in effect any time before July 1, 2028, and does the following:
  - a) Requires the employer to pay all nonprobationary workers working in certain regions, defined in an applicable collective bargaining agreement, total hourly compensation, inclusive of wages, health insurance, pension, training, vacation, holiday, and fringe benefit funds, amounting to not less than 30 percent more than the state minimum wage rate.
  - b) Provides for a grievance and binding arbitration procedure to redress violations that would be redressable under PAGA, and allows the labor organization to pursue a grievance on behalf of all affected employees.
  - c) Expressly waives the requirements of PAGA in clear and unambiguous terms.
  - d) Authorizes an arbitrator to award any and all remedies otherwise available under PAGA except for the award of penalties that would be payable to the Labor and Workforce Development Agency (LWDA).
- 2) Provides that this section shall not apply to a janitorial employee represented by a labor organization that has represented janitors before January 1, 2020, and employed by a janitorial contractor who registered as a property service employer, as specified, in calendar year 2020, with respect to work performed under a valid collective bargaining agreement in effect any time before July 1, 2028.
- 3) Provides that employees are not precluded from pursuing any other civil action against an employer for actions in violation of the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, or any other law prohibiting of discrimination or harassment.
- 4) Provides that any janitorial contractor who has entered into an agreement that meets the criteria in subdivision a), above, as specified, shall within 60 days of entering the agreement, share with the LWDA the following information:
  - a) The name of the janitorial contractor.

- b) The name of the labor organization.
  - c) The number of employees covered by the agreement.
  - d) The duration of the agreement.
- 5) Provides that the exception to PAGA shall expire on the date the collective bargaining agreement expires or on January 1, 2028, whichever is earlier.
- 6) Defines a "janitorial employee" as an employee who cleans and keeps in an orderly condition commercial working areas and washrooms, or the premises of an office, multiunit residential facility, industrial facility, health care facility, amusement park, convention center, stadium, racetrack, arena, or retail establishment and specifies that duties of a janitorial employee involve one or more of the following:
- a) Disinfecting, vacuuming, sweeping, mopping, or scrubbing, and polishing floors.
  - b) Removing trash and other refuse and sorting recyclable material therefrom.
  - c) Dusting equipment, furniture, or fixtures.
  - d) Polishing metal fixtures or trimmings.
  - e) Providing supplies in minor maintenance services.
  - f) Cleaning laboratories, showers, and restrooms.
- 7) Provides that for the purposes of this section, "janitorial employee" does not include any of the following:
- a) Workers who specialize in window washing.
  - b) Housekeeping staff who make beds and change linens as a primary responsibility.
  - c) Workers working at airport facilities or cabin cleaning.
  - d) Workers at hotels, card clubs, restaurants, or other food service operations.
  - e) Grocery store employees and drug-retail employees.
- 8) Specifies that this section shall not apply to existing cases filed before the effective date of this section and that nothing in this section shall prevent a janitorial employee from filing an action under Labor Code (LC) Section 2699.3 if there is a finding by a court or administrative agency of competent jurisdiction that the labor organization has breached its duty of fair representation in relation to a claim under LC Section 2699.3.
- 9) Provides that the bill's provisions shall remain in effect until July 1, 2028, and thereafter, are repealed.

## COMMENTS

According to a 2016 report by the UC Berkeley Labor Center, the janitorial services industry "is currently driven by a highly competitive race to the bottom that results in lower wages and inferior working conditions."<sup>1</sup> This report found that one of the key contributing factors to this race to the bottom is the prevalence of multiple and complex layers of contracting that often shifts employment to smaller, off-the-books and unlicensed employers. The report further noted that highly specialized and responsible contracting practices in the janitorial industry do exist, particularly for workers represented by a union. Under these arrangements, collective bargaining agreements typically set wages, annual increases, and health benefits that far prevail those found in the non-union sector. Unfortunately, unionized and other responsible contractors are still subject to significant pressure from unscrupulous contractors.<sup>2</sup>

### According to the Author

"Low labor costs are the primary grounds on which low-road contractors compete for business, not innovation or productivity. This severely limits the ability of responsible contractors to shift the competitive equilibrium of the industry toward a high road model based on providing quality services, rather than on cutting labor costs. In an effort to level the playing field for responsible contractors and their workers, [this bill] exempts janitorial employees from PAGA if the employee's work is covered by a valid collective bargaining agreement that expressly provides for, among other things, a grievance and binding arbitration process to redress violations that would otherwise be remedied under PAGA. This both supports and advances the collaborative efforts of high road employers and workers to transform the industry and eliminate exploitation and abuse."

### Arguments in Support

According to ABM Industries, sponsor of this bill, "For years, the janitorial industry has had very low barriers to entry due to the low cost of startup costs and equipment such as cleaning products. Since the mid-1970s, the janitorial industry has experienced a race to the bottom and have prioritized a single goal; cut costs. This has negatively impacted janitorial workers who are predominantly women of color and immigrants and has effectively cheated them out of legal wages and exposed them to unsafe working conditions. While these underground employers have negatively impacted their employees, union represented employees have thrived in the state.

[This bill] would exempt janitorial employees from Labor Code 2698 if they are covered by a collective bargaining agreement that contains a grievance and binding arbitration procedure to redress violations and authorize [an] arbitrator to award remedies that are available in the statute. This will help to level the playing field for responsible contractors and their workers against bad actors who have abused the system at the expense of their employees. [This bill] is an excellent mechanism that encourages collaborative efforts between employers and employees to resolve disputes and eliminate abuse."

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<sup>1</sup> Bernhardt, Annette, Hinkley, Sara, and Thompson, Sarah. *Race to the Bottom: How low-road Subcontracting Affects Working Conditions in California's Property Services Industry*. University of California, Berkeley, Center for Labor Research and Education, March 2016.

<sup>2</sup> Ibid.

### Arguments in Opposition

According to The California Business & Industrial Alliance, "We are encouraged to see the Service Employees International Union (SEIU) acknowledge the harm PAGA can cause -- just as our state's construction unions acknowledged with regard to Assembly Bill 1654.2 However, the solution is not -- as the SEIU and Senator Robert Hertzberg recommend with SB 646 -- to carve out an exemption to this misguided law for just one industry.<sup>3</sup> The entire law must be reformed or rescinded in order to equally protect all California industries from often disastrous and unwarranted legal action under PAGA."

### FISCAL COMMENTS

According to the Assembly Appropriations Committee, costs of approximately \$161,000 in the first year and \$149,000 annually until the exemption's sunset date to the Division of Labor Standards Enforcement (DLSE), the entity likely designated by the LWDA to compile information shared by janitorial contractors and answer questions from employees, attorneys and other members of the public.

Additionally, since 75% of penalties imposed under PAGA go to the LWDA for enforcement and educational purposes, the LWDA may experience a reduction in penalty revenue (Special Fund).

### VOTES

#### SENATE FLOOR: 38-0-2

**YES:** Allen, Archuleta, Atkins, Bates, Becker, Borgeas, Bradford, Caballero, Cortese, Dahle, Dodd, Durazo, Eggman, Glazer, Gonzalez, Grove, Hertzberg, Hueso, Hurtado, Jones, Kamlager, Laird, Leyva, McGuire, Melendez, Min, Newman, Nielsen, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Umberg, Wieckowski, Wiener, Wilk

**ABS, ABST OR NV:** Limón, Stern

#### ASM LABOR AND EMPLOYMENT: 7-0-0

**YES:** Kalra, Flora, Lorena Gonzalez, Jones-Sawyer, Reyes, Seyarto, Ward

#### ASM JUDICIARY: 9-1-1

**YES:** Stone, Chau, Chiu, Davies, Lorena Gonzalez, Holden, Kalra, Maienschein, Reyes

**NO:** Kiley

**ABS, ABST OR NV:** Gallagher

#### ASM APPROPRIATIONS: 13-0-3

**YES:** Lorena Gonzalez, Bryan, Calderon, Carrillo, Chau, Fong, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Kalra

**ABS, ABST OR NV:** Bigelow, Megan Dahle, Davies

### UPDATED

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