

Date of Hearing: July 13, 2021

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
SB 646 (Hertzberg) – As Amended July 7, 2021

As Proposed to be Amended

SENATE VOTE: 38-0

SUBJECT: LABOR CODE PRIVATE ATTORNEYS GENERAL ACT OF 2004:
JANITORIAL EMPLOYEES

KEY ISSUE: SHOULD JANITORIAL EMPLOYEES WORKING UNDER A COLLECTIVE BARGAINING AGREEMENT, CONTAINING SPECIFIED PROVISIONS, BE EXEMPT FROM THE RIGHT TO BRING AN ACTION UNDER THE LABOR CODE'S PRIVATE ATTORNEYS GENERAL ACT?

SYNOPSIS

The California Labor Code's Private Attorneys General Act – known as PAGA – is a critically important (and controversial) law that allows aggrieved employees to bring a lawsuit to recover civil penalties on behalf of themselves, their fellow employees, and the State of California for Labor Code violations. Unlike an employee's civil action that seeks to recover damages suffered by the employee, a PAGA lawsuit is a means of private enforcement of Labor Code violations. Enacted in 2003, PAGA reflects the reality that the state's labor enforcement agencies lack the resources to investigate and take action against every violation. Instead, employees who are better positioned to experience day-to-day violations, step into the shoes of the state and bring the action as the state's "private attorney general." Contrary to the claims made by PAGA's critics, employees and their lawyers do not routinely bring frivolous claims to enrich themselves. The employee who brings the suit does not collect any damages; rather, the employee receives 25% of any civil penalty that is imposed, with the other 75% going to the state's Labor and Workforce Development Agency (LWDA). PAGA gives employees the right to bring actions that benefit all employees, and society at large, by ensuring employer compliance with labor laws.

Notwithstanding PAGA's important role in enforcing labor law and protecting workers' rights, the Legislature has carved out narrow exemptions to the law. AB 1654 (Chap. 529, Stats. 2019) exempted any employee in the construction industry working under a collective bargaining agreement (CBA) that contains, among other things, a grievance and arbitration procedures to address workplace violations. The bill now before the Committee would do the same for janitorial employees working under certain CBAs. The bill is co-sponsored by California SEIU and ABM Industries, an employer of janitorial workers. As discussed in the analysis, the Committee has serious concerns about a bill that takes away the right of any worker to exercise the right to bring a PAGA claim. The Committee recommended amendments that would have preserved an employee's right to bring a PAGA claim, so long as the employee first used the CBA resolution process and the union failed take action. The author instead proposes to take an alternative amendment that would allow a PAGA suit to proceed, but only if a court or administrative agency first finds that the labor union has breached its duty of fair representation. As discussed in the analysis, this proposal is also somewhat problematic. If the bill passes out of this Committee today, it will be referred to the Assembly Appropriations Committee.

SUMMARY: Exempts from Labor Code's Private Attorneys General Act (PAGA) certain janitorial workers who are covered by a collective bargaining agreement (CBA) that contains specified provisions. Specifically, **this bill:**

- 1) Exempts from PAGA, until July 1, 2024, a janitorial employee who is employed by a janitorial contractor who registered as a property services employer in the calendar year 2020, and is represented by a labor organization who has represented janitors before January 1, 2021, for work performed under a valid CBA in effect any time before July 1, 2024, that expressly provides for the wages, hours of work, and working conditions of employees, provides premium wage rates for all overtime hours worked, and if the CBA also does all of the following:
 - a) Requires the employer to pay covered workers compensation, as specified, of not less than 30 percent more than the state minimum wage.
 - b) Prohibits violations of the Labor Code and provides for a grievance and binding arbitration procedure to redress those violations, 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 language.
 - d) Authorizes an arbitrator to award any and all remedies otherwise available under the Labor Code, provided that it does not award penalties that would have been payable to the Labor and Workforce Development Agency (LWDA) under PAGA.
- 2) Provides that nothing in this bill precludes an employee from pursuing any other civil action against an employer, as specified.
- 3) Provides that any janitorial contractor that has entered into a CBA that meets the requirements of 1) above, shall within 60 days share specified information with LWDA.
- 4) Defines "janitorial employee" for purposes of the above.
- 5) Provides that nothing in the provisions above shall prevent an employee from filing an action under PAGA if there is a finding by a court or administrative agency that the labor organization has breached its duty of fair representation in relation to a claim under Section 2699.3.
- 6) Specifies that the above provisions shall not apply to existing cases filed before the effective date of this section.
- 7) Provides that the above provisions shall remain in effect until July 1, 2024, and as of that date are repealed.

EXISTING LAW:

- 1) Authorizes, under PAGA, an aggrieved employee to bring a civil action to recover civil penalties – that would otherwise be assessed and collected by LWDA – on behalf of the employee and other current and former employees for certain violations of the Labor Code or incorporated wage orders. (Labor Code Section 2698 *et seq.*)

- 2) Provides that, before an aggrieved employee may commence a PAGA action, the following requirements must be met:
 - a) The aggrieved employee must give a prescribed written notice to both LWDA and the employer that identifies the provisions of the Labor Code allegedly violated and presents the facts and theories supporting that claim. Requires LWDA to provide a written notice to the employer and aggrieved employee as to whether it intends to investigate the violations within 60 days.
 - b) LWDA has notified the employer and the aggrieved employee that it does not intend to investigate the alleged violation. Only upon receipt of the notice, or if no notice is received within 65 calendar days, may the aggrieved employee commence the PAGA action. In addition, for certain violations, an employer has 33 days to cure the violation before the employee may bring the action. However, no employer may avail itself of the right to cure more than once in a 12-month period. (Labor Code Section 2699.3)
- 3) Exempts, until January 1, 2028, employees in the construction industry from the above provisions if the employee performs work under a CBA that includes certain provisions, including a provision that provides for arbitration and allows the arbitrator to obtain remedies otherwise available under PAGA, provided that nothing in the CBA would authorize an award of the penalties that would have gone to LWDA under PAGA. (Labor Code Section 2699.6.)
- 4) Authorizes a court, if it determines that a violation has occurred, to award civil penalties, which shall be distributed as follows: 75% to LWDA for enforcement of labor laws and education of employers and employees about their rights and obligations under the Labor Code; and 25% to the aggrieved employees. (Labor Code Section 2699 (g)-(i).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill exempts janitorial employees from PAGA – that is, it denies the employee the right to file a PAGA claim – if the employee performs the work under a CBA that, among other things, provides for a grievance and arbitration process that redresses grievances otherwise remedied in a PAGA suit. According to the author:

PAGA, while a powerful tool for underrepresented workers, is a highly complex legal process. The threat of extended litigation, including wide-ranging discovery allowed when prosecuting civil claims in court, on behalf of an entire class of workers, provides enormous pressure on employers to settle claims regardless of the validity of those claims. As such, the Legislature previously granted a modest PAGA exemption to construction workers covered by a collective bargaining agreement in recognition that such agreements are effective and fair to workers and employers as they are mutually agreed upon with a relative “balance of power” between employees and employers. This bill seeks to provide that same modest exemption to janitorial contractors with employees performing duties under a collective bargaining agreement. This will level the playing field for responsible janitorial contractors and their workers, and both supports and advances the collaborative efforts of high road employers and workers to transform the industry and eliminate exploitation and abuse.

Background: In defense of PAGA. The California Labor Code's Private Attorneys General Act – known as PAGA – is a critically important (and controversial) law that allows aggrieved employees to bring a lawsuit to recover civil penalties on behalf of themselves, their fellow employees, and the State of California for Labor Code violations. Unlike an employee's civil action that seeks to recover damages suffered by an employee, a PAGA lawsuit is a means of private enforcement of Labor Code violations. Enacted in 2003, PAGA reflects the reality that the state's labor enforcement agencies lack the resources to investigate and take action against every violation. Instead, employees who are better positioned to experience day-to-day violations, step into the shoes of the state and bring the action as the state's "private attorney general."

Contrary to the claims of PAGA's many critics, employees and their lawyers do not routinely use PAGA to bring frivolous claims to enrich themselves. The employee who brings the suit does not collect *any* damages; rather, the employee receives 25% of any civil penalty that is imposed, with the other 75% going to the state's Labor and Workforce Development Agency (LWDA) for enforcement and educational purposes. PAGA gives an aggrieved employee the right to bring an action that will benefit all employees, and indeed society at large, by ensuring employer compliance with labor laws.

Before commencing a PAGA action, an aggrieved employee must first provide written notice to both the LWDA and the employer. The notice must identify the specific code provisions violated and present the facts and theories supporting the claim that a violation has occurred. LWDA then has between 60 and 65 days to notify both the employer and aggrieved employee as to whether or not it will investigate the complaint. Only after LWDA has given notice that it will not investigate the alleged violation can the aggrieved employee commence a PAGA action. Some violations require more steps. For certain Labor Code violations, usually less serious violations, employers must be given 33 days to "cure" or correct the violation before a PAGA action may be filed. Just what Labor Code violations should be subject to the "right to cure" has been the subject of many bills presented to the Legislature. For example, AB 1506 (Chap. 445, Stats. 2015) moved certain wage statement violations into the category of violations that require giving the employer a right to cure. In short, PAGA is a very measured statute that establishes several preconditions before an action may be filed, and once filed it limits the employee's recovery to just 25% of any civil penalty awarded. It is not a statute that allows an employee to file a lawsuit at the drop of a dime – the laments of its critics notwithstanding.

Exemptions for unionized workers. Although most efforts to curb the scope of PAGA actions have come from employers, recently labor groups have also advocated limited exemptions for employees working under a collective bargaining agreement. Most recently, AB 1654 (Chap. 529, Stats. 2019) exempted any employee in the construction industry working under a valid collective bargaining agreement (CBA) that contains, among other things, a grievance and arbitration procedures to address workplace violations. The bill now before the Committee would effectively do the same for janitorial employees working under certain CBAs. While the Committee has expressed its concerns about potentially weakening PAGA, there are sound reasons for exempting represented employees working under a CBA, so long as the CBA provides a grievance and arbitration procedure that can address the Labor Code violation that would otherwise be redressed in a PAGA suit, including a provision that will allow the union to pursue a grievance on behalf of all affected employees. Ideally, then, the CBA process provides an equal and adequate alternative to a PAGA suit.

A very narrow, and time-limited, exemption. The exemption created by this bill is exceptionally narrow; by no means will it exempt from PAGA all janitorial employees working under a CBA. To begin with, the exemption will only apply to a very narrow range of employers, specifically, to “a janitorial contractor who registered as a property service employer . . . in calendar year 2020.” Notably, the language does not say a contractor who registered “by” 2020 or “prior to 2020,” or even who “was registered in” 2020. The bill only applies to an employer who registered *in* the year 2020. The Committee is not entirely clear as to *why* the bill is so limited. Why, for example, would it not apply to an employer who registered in 2019 or an employer who registered in 2021? In addition, just as the PAGA exemption only applies to employees working for a very a narrow range of employers, it also only applies to employees organized by a very narrow range of unions. Specifically, the exemption under this bill only applies to an employee represented by a labor organization “who has represented janitors before January 1, 2021.” In short, no upstart union will be subject to the exemption. Presumably, the purpose of this limitation is to ensure that an employer does not create a sham “company union” just for the purpose of taking advantage of the PAGA exemption. Finally, in addition these limitations, the bill will only remain in effect until July 1, 2024, and as of that date will be repealed.

What happens if the CBA process fails to address or correct the violation? The Committee believes that, if employees under a CBA lose their right to bring a PAGA action, then there should be some backstop if the CBA process fails to adequately address the complaint and the violation remains unresolved. The Committee believes that in such a situation, the employee should be permitted to bring a PAGA action, but only after the employee has first made use of the CBA process and failed to get a good faith response. In other words, employees working under a CBA with a meaningful investigation and arbitration process should make use of that process *first*, before filing a PAGA claim. However, if this process proves to be nonresponsive and fails to redress the violation, then the PAGA right should be preserved.

The author instead has proposed language that would allow a PAGA suit to proceed only if a court or administrative agency first finds that the labor union breached its duty of fair representation. These amendments will be taken as part of the author’s amendments that appear at the end of this analysis.

The Committee, however, is concerned that this language will invite the very litigation that the author and sponsors claim that they want to avoid. The author’s proposed amendment would only allow an employee to bring a PAGA action if there is a “finding” by a court or administrative agency that the union has breached its duty. However, the only way an employee could get such a “finding” would be by bringing an action alleging breach of duty. In other words, an employee who has attempted to use the CBA process, but failed to get results due to the conduct of the union or the employer, could only file a PAGA claim by first bringing an action against the union for breach of duty, so that they could obtain a “finding,” so that they could then use this finding to file a PAGA claim. In short, the proposed language would actually *require* litigation because that is the only way the employee could obtain a “finding.”

Perhaps the goals of the Committee and author to protect employees while avoiding litigation could be achieved if there were a time limit on the number of days allowed for a dispute to be resolved by means of the grievance and arbitration process before the

employee would be allowed to file a PAGA claim. Such a time limit would also place pressure on the parties to resolve their disputes in a timely matter and avoid the PAGA process, which ultimately would be in the best interest of all parties.

In sum, the Committee remains concerned that the logic of this bill, as with AB 1654 of 2019, could lead to the erosion of PAGA rights for union workers, and that, even as proposed to be amended, the bill does not provide an adequate remedy if the CBA process fails to correct the violation. Having said that, the bill as proposed to be amended is sufficiently narrow and time-limited, for the present, to assuage those concerns somewhat.

The Committee hopes that AB 1654 and SB 646 do not become a pattern, so that in the coming years more unions and employers do not seek legislation carving out industry-specific exemptions, until eventually all union workers are denied the right to bring a PAGA claim. At that point it could be a short step to severely limiting that right for all workers, whether organized or not.

ARGUMENTS IN SUPPORT: SEIU, one of two co-sponsors of this bill writes that “for more than two decades, the Justice for Janitors movement has helped workers in low-wage industries achieve a better life and has earned broad-based support from the public as well as religious, political and community leaders. From across California, more than 25,000 janitors united in SEIU-USWW are leading the effort to create wages you can raise a family on, access to quality health care, and respect on the job.”

Nonetheless, SEIU notes that despite these organizational gains, the janitorial industry has seen a “race to the bottom,” largely because of the complex pattern of contractors and subcontractors and the intense competition that it brings, thus forcing wages downward. SEIU cites studies showing that unionized employers tend to be much more responsible contractors who pay higher wages and provide better benefits. In addition to poorer wages and fewer benefits, SEIU cites a report by the Economic Policy Institute which concluded that non-unionized workers were “nearly twice as likely to experience wage theft.”

SEIU concludes that it “is a firm supporter and defender of the Private Attorney General Act (PAGA). With that in mind, we do not take exemptions lightly. However, the specific dynamics in the janitorial industry warrant the passage of SB 646. We believe doing so will help level the playing field for the responsible contractors and our workers in the janitorial industry.”

ABM Industries, a janitorial contracting employer who is co-sponsoring this measure with SEIU, supports the bill for the same reasons articulated by SEIU. It adds: “This bill is an excellent mechanism that encourages collaborative efforts between employers and employees to resolve disputes and eliminate abuse.”

ARGUMENTS IN OPPOSITION: This bill is opposed by the California Business and Industrial Alliance (CABIA), because it *does not go far enough* in limiting the ability of workers to file PAGA complaints. CABIA is “encouraged” that SEIU recognizes the “harm” that PAGA can cause to small businesses, but it argues that the bill is “misguided” in its effort to “carve out an exemption . . . for just one industry.” CABIA claims that PAGA has exposed California employers to “costly and often-frivolous legal attacks for even a minor or accidental violation of California’s more than 1,100-page Labor Code.” CABIA’s proposes instead that “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.”

Proposed Author Amendments. The author wishes to take the following amendments in this Committee, which are reflect in bold print the mock-up below:

Section 2699.8 is added to the Labor Code to read as follows:

2699.8. (a) This part shall not apply to a janitorial employee employed by a janitorial contractor who registered as a property service employer pursuant to Section 1423 in calendar year 2020, **and represented by a labor organization who has represented janitors before January 1, 2021,** with respect to work performed under a valid collective bargaining agreement in effect any time before July 1, 2024, that expressly provides for the wages, hours of work, and working conditions of employees, provides premium wage rates for all overtime hours worked, and does all of the following:

(1) Requires the employer to pay all nonprobationary workers working in certain worksites, 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.

(2) Prohibits all of the violations of this code that would be redressable pursuant to this part, and provides for a grievance and binding arbitration procedure to redress those violations **and allows the labor organization to pursue a grievance on behalf of all affected employees.**

(3) Expressly waives the requirements of this part in clear and unambiguous terms.

(4) Authorizes the arbitrator to award any and all remedies otherwise available under this code, provided that nothing in this section authorizes the award of penalties under this part that would be payable to the Labor and Workforce Development Agency.

(b) Except for a civil action under Section 2699, nothing in this section precludes an employee from pursuing any other civil action against an employer, including, but not limited to, an action for a violation of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code), Title VII of the Civil Rights Act of 1964 (Public Law 88-352), or any other prohibition of discrimination or harassment.

(c) **Any janitorial contractor who has entered into an agreement that meets the criteria in section (a) above, shall within 60 days share with the Labor and Workforce Development Agency the following information: the name of the janitorial contractor, the name of the labor organization, the number of employees covered by the agreement, and the duration of the agreement.** The exception provided by this section shall expire on the date the collective bargaining agreement expires or on July 1, 2024, whichever is earlier.

(d) (1) Except as provided in paragraph (2), for purposes of this section, “janitorial employee” means an employee whose primary duties are to clean and keep 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. 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.

(2) For 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.

(e) This section shall remain in effect only until July 1, 2024, and as of that date is repealed.

(f) This section shall not apply to existing cases filed before the effective date of this section.

(g) Nothing in this section shall prevent an employee from filing an action under 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 Section 2699.3.

REGISTERED SUPPORT / OPPOSITION:

Support

Able Building Maintenance
 ABM Building Value
 California State Council of Service Employees International Union (SEIU California)
 Flagship Facility Services, INC
 ISS Facility Services, INC.
 Pacific Association of Building Service Contractors

Paragon Services Janitorial Orange County, LLC
Tuttle Family Enterprises INC Dba Peerless Building Maintenance

Opposition

California Business and Industrial Alliance

Analysis Prepared by: Thomas Clark / JUD. / (916) 319-2334