

Date of Hearing: July 6, 2021

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kalra, Chair

SB 646 (Hertzberg) – As Amended June 21, 2021

SENATE VOTE: 38-0

SUBJECT: Labor Code Private Attorneys General Act of 2004: janitorial employees

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, 2024 and provided that agreement contains, among other things, a grievance and binding arbitration procedure to redress violations that could have been remedied under PAGA. Specifically, **this bill:**

- 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, 2024, 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.
 - 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 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.
- 3) Provides that the exception to PAGA shall expire on the date the collective bargaining agreement expires or on January 1, 2024, whichever is earlier.
- 4) 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.
- 5) 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.
- 6) Provides that the bill’s provisions shall remain in effect until July 1, 2024, and thereafter, are repealed.

EXISTING LAW:

- 1) Establishes PAGA, which authorizes an aggrieved employee to bring a civil action to recover specified civil penalties that would otherwise be assessed and collected by the LWDA, on behalf of the employee and other current or former employees for certain violations of the Labor Code.
- 2) Requires the aggrieved employee to follow prescribed procedures before bringing an action under PAGA, including but not limited to, giving written notice to both the LWDA and the employer of the provisions of the Labor Code allegedly violated as well as facts supporting the claim.
- 3) Requires that LWDA to provide written notice to the employer and the aggrieved employee or representative as to whether it intends to investigate the alleged violation within 60-65 calendar days of the postmark date of the written notice.
- 4) Provides that, in the event the LWDA decides to investigate the alleged violation, it has up to 180 calendar days to investigate and cite the employer.
- 5) Provides, with certain exceptions, the following distribution of civil penalties under PAGA: 75% to be distributed to the LWDA for enforcement of labor laws and for education of employers and employees about their rights and responsibilities, and 25% to be distributed to the aggrieved employees.
- 6) Requires superior court review and approval of any settlement under PAGA.

FISCAL EFFECT: Unknown

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.”¹ 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.²

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 the 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.”

¹ 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.

² Ibid.

Related and Prior Legislation

AB 530 (Fong) of 2021 would require an aggrieved employee to inform the employer which specific violations of the code are being brought under each subdivision of PAGA and to inform the employer if statutory right to cure provisions apply. AB 530 is a two-year bill in this Committee.

AB 385 (Flora) of 2021 would prohibit an aggrieved employee from maintaining an action on behalf of themselves or any other aggrieved employee under PAGA if certain conditions apply, including if the aggrieved employee has brought an action under the act in conjunction with, or in addition to, claims for monetary damages or penalties for violations of the Labor Code arising out of the same period of employment that occurred between March 4, 2020, and the state of emergency termination date, as defined. AB 385 is a two-year bill in this Committee.

SB 729 (Portantino) of 2020 would have provided that an employee, who is working from home due to the COVID-19 pandemic, shall not recover civil penalties under PAGA for a missed meal or rest break for the period of March 19, 2020 to December 31, 2022. The bill died in this Committee.

AB 2016 (Fong) of 2018 would have modified the procedures for bringing a civil action under PAGA, what violations may be cured, the timeline for curing those violations, and the remedies available to aggrieved employees. The bill died in this Committee.

AB 1429 (Fong) of 2017 would have limited the violations for which an aggrieved employee is authorized to bring a civil action under PAGA and would have required the employee to follow specified procedures before bringing an action. The bill would have capped the civil penalties recoverable under PAGA to \$10,000 per claimant and would have excluded the recovery of filing fees by a successful claimant. The bill would have also required the superior court to review any penalties sought as part of a settlement agreement under PAGA. The bill died in this Committee.

AB 1430 (Fong) of 2017 would have revised PAGA to require the LWDA, after receiving notification of an alleged PAGA violation, to investigate the alleged violation and either issue a citation or determine if there is a reasonable basis for a civil action. The bill would have authorized an aggrieved employee to commence an action upon receipt of notice from the LWDA that there is a reasonable basis for a civil action, or if the LWDA fails to provide timely notification or any notification, as specified. The bill died in this Committee.

SB 836 (Committee on Budget), Chapter 31, Statutes of 2016. Among other things, this budget trailer bill makes several changes to PAGA, including an extension of the time period for the LWDA to review and investigate PAGA claims. SB 836 also requires a copy of the proposed settlement of a PAGA claim to be submitted to the LWDA at the same time that it is submitted to a court, and requires parties to provide the LWDA with a copy of the court's judgement.

AB 1506 (R. Hernández), Chapter 445, Statutes of 2015 provides an employer with the right to cure a violation of failing to provide its employees with a wage statement containing the inclusive dates of the pay period and the name and address of the legal entity that is the employer.

SB 1255 (Wright), Chapter 843, Statutes of 2012 provides a statutory definition of what constitutes “suffering injury” for purposes of recovering damages pursuant to the itemized wage statement requirements, including failure by the employer to provide a wage statement or failure to provide accurate or complete information regarding other specified items.

SB 899 (Poochigian), Chapter 34, Statutes of 2004 exempted workers compensation provisions of the Labor Code from enforcement through PAGA.

SB 1809 (Dunn), Chapter 221, Statutes of 2004 significantly amended PAGA by enacting specified procedural and administrative requirements that must be met prior to bringing a private action to recover civil penalties for Labor Code violations.

SB 796 (Dunn), Chapter 906, Statutes of 2003 established a process whereby an aggrieved employee can bring a civil action to recover specified civil penalties that would otherwise be assessed and collected by the LWDA, on behalf of the employee and other current or former employees for certain violations of the Labor Code.

REGISTERED SUPPORT / OPPOSITION:

Support

Able Building Maintenance

ABM Building Value - Industries (Sponsor)

California State Council of Service Employees International Union (SEIU California)

Flagship Facility Services, INC

Paragon Services Janitorial Orange County, LLC

Tuttle Family Enterprises INC DbA Peerless Building Maintenance

Opposition

None on file.

Analysis Prepared by: Martin Vindiola / L. & E. /