
UNFINISHED BUSINESS

Bill No: SB 646
Author: Hertzberg (D)
Amended: 8/30/21
Vote: 21

SENATE ENERGY, U. & C. COMMITTEE: 14-0, 4/26/21
AYES: Hueso, Dahle, Becker, Borgeas, Bradford, Dodd, Eggman, Gonzalez,
Grove, Hertzberg, McGuire, Min, Rubio, Stern

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SENATE FLOOR: 38-0, 5/13/21
AYES: 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
NO VOTE RECORDED: Limón, Stern

SENATE LABOR, PUB. EMP. & RET. COMMITTEE: 4-1, 9/8/21 (Pursuant to
Senate Rule 29.10)
AYES: Cortese, Durazo, Laird, Newman
NOES: Ochoa Bogh

ASSEMBLY FLOOR: 65-2, 9/2/21 - See last page for vote

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

SOURCE: Author

DIGEST: This bill allows janitorial employees who are covered by a collective bargaining agreement that meets certain conditions to be exempt from filing a lawsuit against their employer under the Private Attorneys General Act of 2004.

Assembly Amendments:

- 1) Remove original language of the bill relating to the Public Utilities Code and add language relating to the Private Attorneys General Act of 2004.
- 2) Allow janitorial employees who are covered by a collective bargaining agreement with specified stipulations to be exempted from the Private Attorneys General Act of 2004.
- 3) Add a definition of "Janitorial Employee".
- 4) Specify professions and duties which are not included under the "janitorial employee" definition.
- 5) Establish a sunset date of January 1, 2028, for the provisions of SB 646.

ANALYSIS:

Existing law:

- 1) Establishes the Private Attorneys General Act (PAGA) and allows an aggrieved employee to recover a civil penalty normally assessed and collected by the Labor and Workforce Development Agency through a civil action. In order to file a PAGA action, the following requirements must be met:
 - a) The aggrieved employee or representative must give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.
 - b) The California Labor and Workforce Development Agency (Agency) must notify the employer and the aggrieved employee or representative by certified mail whether it does or does not intend to investigate the alleged violation within 60-65 calendar days of the postmark date of the notice.
 - c) If the Agency decides to investigate the alleged violation, it has up to 180 calendar days to investigate and cite the employer. If the Agency declines to investigate or issue a citation, the aggrieved employee or representative may then file a PAGA claim. (Labor Code §§2699-2699.5)

- 2) Provides that for any civil penalties recovered, the Labor and Workforce Development Agency (LWDA) shall receive 75% of the amount and the employee bringing the action shall receive the other 25%. Provides that any employee who prevails in a PAGA action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee. (Labor Code §2698-2699.5)
- 3) Requires any person or entity which employs a janitor, as defined in the Service Contract Act Directory of Occupations maintained by the US Department of Labor, to register with the Labor Commissioner annually. (Labor Code §1423)
- 4) Requires any janitorial employer to keep accurate records showing all of the following:
 - a) The names and addresses of all employees engaged in rendering services for any business of the employer.
 - b) The hours worked daily by each employee, including the times the employee begins and ends each work period.
 - c) The wage and wage rate paid each payroll period.
 - d) The age of all minor employees.
 - e) Any other conditions of employment.
 - f) The names, addresses, periods of work, and compensation paid to all janitorial workers. (Labor Code §1421)
- 5) Prohibits the Department of Labor Standards Enforcement (DLSE) from renewing the registration of an employer if that employer has not fully satisfied any final judgment for unpaid wages due to an employee. (Labor Code §1430)

This bill:

- 1) Exempts from PAGA a janitorial employee represented by a labor organization and covered by a collective bargaining agreement in effect before July 1, 2028, and which expressly provides for wages, hours of work including overtime, and working conditions and fulfills the following additional criteria:
 - a) Requires the employer to pay all nonprobationary workers *working in certain worksites* total hourly compensation (inclusive of wages, pension and other benefits) amounting to not less than 30% above the state minimum wage.

- b) Prohibits all of the violations of the labor code that would be redressable under PAGA, provides for a grievance and binding arbitration process to redress these violations, and allows labor organizations to pursue a grievance on behalf of an employee.
 - 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 the labor code, provided that nothing in this section authorizes the award of penalties that would be payable to the Labor and Workforce Development Agency.
- 2) Defines “janitorial employee” to mean an employee whose primary duties, as specified, 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.
- 3) Specifies that “janitorial employee” does NOT include 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.
- 4) Provides that this bill does not apply to existing cases filed before the effective date of these provisions.
- 5) Clarifies that this bill does not preclude an employee from pursuing a civil action against an employer outside of Section 2699. This includes the California Fair Employment and Housing Act.
- 6) Requires that any janitorial contractor who enters into a collective bargaining agreement which meets the criteria described in this bill, within 60 days of entering the agreement, share the following information with the Labor and Workforce Development Agency (LWDA):

- 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.
- 7) Provides that the PAGA exception provided by this bill expires on the date the collective bargaining agreement expires or on of July 1, 2028, whichever is earlier.
- 8) Specifies that these provisions remain in effect only until July 1, 2028 and as of that date is repealed.

Comments

1) *Development of the Private Attorneys General Act*

17 years ago, this Committee first heard SB 796 (Dunn), Chapter 906, Statutes of 2003, which created what we now know today as the Private Attorneys General Act (PAGA). Today, PAGA fills a unique niche in the political realm as a “four letter word”, much like the California Environmental Quality Act (CEQA).

With its ubiquity today, the context for the creation of PAGA is often forgotten. Specifically, as was noted in the original 2003 Senate Labor Committee and Senate Judiciary Committee analyses, many stakeholders voiced concern that the California Labor and Workforce Development Agency’s budget had not kept up with the growth of California’s economy. This was in part by design: under Governor George Deukmejian, Cal-OSHA positions were slashed and all hiring was frozen in 1983, and then Cal-OSHA was actually abolished until court action and a ballot initiative brought Cal-OSHA back into existence in 1988. Under Governor Pete Wilson, hiring freezes and limited resources for labor law enforcement was the norm. By the time Governor Gray Davis assumed office in 1998, labor law enforcement had been deprioritized for sixteen years.

The impact of this neglect has been felt deeply. As of 2018, staffing level ratios at Cal-OSHA were three times lower than both Washington and Oregon, and more recently the agency has been plagued by staffing shortages in their compliance, legal and investigation units. It is only in more recent administrations that the Department of Industrial Relations, under former

Director Christine Baker, began to show significant movement towards hiring additional staff and improving labor law enforcement for all Californians.

In an attempt to give California workers an additional avenue for recourse, PAGA was launched in 2003 by the Legislature. That bold step gave workers the chance to pursue their claims in a manner that was not dependent on budgetary pressures, changes in administration, or available state resources.

2) *SB 646 and PAGA*

As time has passed since the adoption of PAGA, the situation has evolved. While PAGA has given thousands of workers additional recourse to pursue action against their employers for unlawful violations, lawsuits remain a costly and time-intensive process. Given that the employee also only receives 25% of the eventual civil penalties recovered, generally an action under PAGA means a costly battle for both the employee and employer with little upside.

SB 646 approaches this problem by acknowledging that PAGA is still a worthwhile tool, but offers an alternate path for employers and employees. SB 646 would allow a collective bargaining agreement (CBA) negotiated by a union organization to contain language that would exempt janitorial employees from PAGA if that CBA also provides that those janitors would make 30% above the minimum wage. This means that employers are incentivized to allow employees to unionize and collectively bargain, allowing them to turn to mandatory arbitration instead of the courtroom in the event of labor code violation. Employees that decide to accept this compromise are then benefitted by higher wages and more opportunities to explore worker organizations with less acrimony and even potential encouragement from employers.

However, there is some logical concern that continued exemptions could undermine PAGA in the long term. As noted in the Assembly Judiciary Committee analysis:

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. 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.

It is extremely unlikely that a union organization would negotiate a CBA that precludes PAGA suits without an adequate cure process for labor code violations, for a number of reasons. The point stands, however, that carving specific industries or occupations out of PAGA runs the long-term risk of undermining a potentially aggrieved worker's right to seek justice.

Related/Prior Legislation

AB 1654 (Rubio, Chapter 529, Statutes of 2018) exempted workers in the construction industry from the ability to pursue a civil action for an alleged violation of Labor Law protections if the worker is covered by a collective bargaining agreement, as specified.

SB 796 (Dunn, Chapter 906, Statutes of 2003) established the Private Attorneys General Act of 2004, which allows aggrieved employees to bring civil actions against employers to recover civil penalties, if the appropriate labor agency or its departments, divisions, commissions, boards, agencies, or employees do not do so.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

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).

SUPPORT: (Verified 9/8/21)

Able Building Maintenance

ABM Industries

Flagship Facility Services, INC

ISS Facility Services, INC.

Pacific Association of Building Service Contractors

Paragon Services Janitorial Orange County, LLC

SEIU California

Tuttle Family Enterprises INC

OPPOSITION: (Verified 9/8/21)

California Business and Industrial Alliance

ARGUMENTS IN SUPPORT: SEIU California writes in support:

The janitorial industry has relatively low barriers to entry as the startup costs of cleaning products and equipment are low. For this reason, since the mid-1970s, the janitorial industry has focused on one objective: cutting costs. This created a race to the bottom, an environment where workers, predominantly women of color and immigrants, are cheated out of legal wages and exposed to unsafe working conditions, including sexual assault, while responsible law-abiding employers are pushed out by lawbreaking competitors.

There is clear evidence of a race to the bottom in the janitorial industry where responsible contractors fight to retain contracts, which can be ended with a 30-day notice, meanwhile scofflaws use a series of contractual relationships to skirt California law and compete unfairly against the responsible contractors. Because of the complex nature of subcontracting, these employers are difficult to find and very unlikely to face litigation. Hence, in the contracted janitorial industry the good actors are more likely to face litigation, while the bad actors continue to evade California law.

SEIU California 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.

ARGUMENTS IN OPPOSITION: The California Business and Industrial Alliance writes in opposition:

PAGA is a harmful law that opens Golden State employers up to costly and often-frivolous legal attacks for even a minor or accidental violation of California's more than 1,100-page Labor Code. A March 2021 study by Len Baker and Christine Welsh—top Labor Department appointees under Governors Schwarzenegger and Brown—analyzed data from five years of PAGA lawsuits and found the outcomes are often suboptimal for employees.

They found that employees actually recoup less money through PAGA court cases than through cases decided by the Labor and Workforce Development Agency (LWDA), mainly because trial attorneys receive exorbitant payouts from the former.

Fixing PAGA does not mean giving bad employers license to break the law. Rather, it means properly funding and staffing the state's Labor and Workforce Development Agency to do its job, ensuring that wronged employees rather than trial lawyers are compensated after the law is broken. As Ms. Baker and Mr. Welsh point out in their report, funding reserves accessible by LWDA and the agencies under its authority exist in the amount of more than \$113 million. These funds could serve to finance the creation of an alternative administrative framework that could provide faster and better outcomes for employees.

ASSEMBLY FLOOR: 65-2, 9/2/21

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Bryan, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Cooley, Cooper, Cunningham, Daly, Flora, Fong, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Lackey, Lee, Levine, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Mullin, Muratsuchi, O'Donnell, Petrie-Norris, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Seyarto, Stone, Ting, Valladares, Villapudua, Waldron, Ward, Akilah Weber, Wicks, Wood

NOES: Kiley, Smith

NO VOTE RECORDED: Bigelow, Choi, Megan Dahle, Davies, Frazier, Gallagher, Nazarian, Nguyen, Patterson, Quirk, Voepel, Rendon

Prepared by: Jake Ferrera / L., P.E. & R. / (916) 651-1556
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