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California Voters May Deal a Fatal Blow to PAGA

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Things aren't looking so good for the long-term health of the Labor Code Private Attorneys General Act ("PAGA").

On top of the U.S. Supreme Court's granting review of a case challenging PAGA's anti-arbitration rule (as we reported here) and a separate challenge brought by an association of California business owners currently pending before the California Court of Appeal, a new initiative is headed for the November 2022 ballot, which could deliver a fatal blow to the much-maligned law – and it couldn't happen to a nicer statute! (Former Governor Gray Davis unleashed this controversial measure on Californians shortly after he lost the recall election in October 2003.)

In its present form, PAGA authorizes allegedly "aggrieved" employees to bring representative actions to recover hefty penalties for purported Labor Code violations (many of which have resulted in absolutely *no harm* to a single employee). More importantly, the engine that makes these lawsuits run is the recovery of attorneys' fees. Well over 6,000 PAGA lawsuits were filed in 2020 alone. The law has been criticized for enriching a small (but ever-growing) group of "bounty-hunting" plaintiffs' lawyers who share but a fraction of the payouts with the "aggrieved" employees and the state, which is why we affectionately refer to PAGA as the "Prettymuch All Goes to the Attorneys" statute. (See also the California Chamber of Commerce's take on PAGA (here)).

If passed by the voters in November, the Fair Pay and Employer Accountability Act ("FPEAA" – admittedly, not as catchy an acronym as "PAGA") will take enforcement out of the hands of private "aggrieved" employees and their attorneys and give it back to the Labor Commissioner. FPEAA bestows upon affected employees 100% of the penalties recovered, which is a major change from PAGA, which gives employees only 25% of the total penalty amount. The proposed law also would eliminate "stacking," which allows penalties for multiple violations to add up quickly and reach astronomical amounts.

In addition, the FPEAA would establish a Consultation and Policy Publication Unit within the Department of Industrial Relations to publish information and provide confidential consultations to employers with compliance questions, and charges the California Legislature with ensuring the Department has the funding necessary for enforcement.

Stay tuned here as PAGA weathers the many challenges 2022 seems to have in store for it!

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