November 27, 2017

Hon. Xavier Becerra
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Ashley Johansson
Initiative Coordinator

Dear Attorney General Becerra:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative (A.G. File 17-0035) related to private legal actions that enforce state labor laws.

BACKGROUND

California Labor Law. The California Labor Code consists of laws that employers must follow with respect to employee wages, hours, breaks, and working conditions. For example, the Labor Code specifies the state minimum hourly wage, when employees must receive overtime pay, when meal and rest breaks must be provided, what information must be included on pay stubs, and what steps employers must take to provide a safe and healthy workplace.

Employers Who Violate Labor Laws Must Pay Any Unpaid Wages and Applicable Penalties. Common violations of the Labor Code include not paying overtime, failing to pay the minimum wage, delayed payment, and unreimbursed business expenses. Although employers are responsible for providing unpaid wages to employees when the employer has violated a wage law, some Labor Code violations also carry penalties that employers must pay (in addition to unpaid wages, if applicable). For example, there is a $250 penalty for each pay period the state's minimum wage is not met. These penalties are assessed by state agencies, typically paid to the state, and intended to improve compliance with labor law by making violations costlier for employers.

State Law Allows Employees to File Wage Claims With Labor Commissioner. One way employees may seek unpaid wages is by filing a wage claim with the Labor Commissioner's Office, which enforces state laws related to pay, hours, meal and rest breaks, employee classification, and payroll recordkeeping. (A separate state office enforces workplace health and safety laws.) In 2016, employees filed approximately 32,000 wage claims. When an employee files a claim with the Labor Commissioner, staff hold an informal conference with the employee and employer to resolve the dispute. If it cannot be resolved informally, a formal administrative hearing is held and a final determination is made. Either party may appeal the final determination to the courts. (For nonwage technical violations, such as incomplete pay stubs, employees cannot submit wage claims and therefore must directly file a lawsuit against their employer in court. They can also file a lawsuit against their employer for wage-related violations as an alternative to filing a claim with the Labor Commissioner.)

Private Attorneys General Act (PAGA) Allows Employees to Collect Labor Code Penalties. Prior to 2004, employees could seek unpaid wages from their employer by filing a lawsuit in court to recover the wages (as they still can today), but they could not seek the additional penalties in these cases because only state agencies were authorized to assess penalties. This changed in 2004 when the state enacted PAGA, which allows employees to sue their employers to collect a share of penalties associated with the violations. (As discussed below, PAGA penalty revenues are shared between the state and the affected employees.) The intent of PAGA is to improve enforcement of the state's labor laws by offering an alternative to state-lead enforcement that could be used, for example, when the Labor Commissioner lacks the resources to enforce fully all alleged Labor Code violations.

PAGA differs from wage claims and traditional civil lawsuits in several other aspects:

- ***Lawsuits Proceed Only After State Declines to Investigate.*** Employees who wish to pursue a PAGA lawsuit against an employer must first notify the state of the alleged violation and their intent to pursue a lawsuit. If the state does not investigate or if the investigation does not lead to a citation, the employee may proceed with the lawsuit. In recent years, the state has received between 4,000 and 8,000 PAGA notices annually. Due to budgetary constraints, it has typically investigated fewer than 1 percent of these notices (additional resources were provided recently to investigate more notices).

- ***Extends Penalties to All Other Labor Code Violations.*** The PAGA allows employees to seek a penalty—$200 per pay period per violation—for each Labor Code violation that occurred, not just for Labor Code violations that carry a specified penalty under state law.

- ***Authorizes Representative Legal Action*****.** Under PAGA, employees can seek penalties for violations that affected them personally and for violations that affected other employees. For instance, if the plaintiff was not adequately paid for overtime hours, he or she could represent other employees whose overtime hours were also underpaid. In this way, PAGA cases are similar to class-action lawsuits, where individuals join one lawsuit instead of filing separate suits. Unlike class actions, however, an employee who files a PAGA lawsuit may include in the lawsuit violations that he or she did not personally suffer but that were allegedly suffered by other, represented, employees.

- ***Penalties Split Between State and Employees.*** Unlike penalties collected by the Labor Commissioner, penalties paid under PAGA are distributed 75 percent to the state (to be used for labor law enforcement activities) and 25 percent to the affected employees. In 2016-17, the state received about $20 million in PAGA-related penalties.

Most PAGA Lawsuits Are Settled Before Trial. Few PAGA lawsuits go to trial. Instead, employees and employers typically reach a settlement agreement after initial legal proceedings have begun but before the trial begins. The settlement award typically includes a small penalty portion that is divided between the employees (25 percent) and the state (75 percent).

PROPOSAL

This measure repeals the Private Attorneys General Act. To remedy labor law violations, employees would still be able to file wage claims with the Labor Commissioner's Office or file traditional lawsuits against their employer in court. The measure also specifies that for Labor Code violations where no penalty is specifically provided in state law, there will be a $200 penalty that may be pursued only by the Labor Commissioner. Proceeds from these new penalties would be divided equally between the affected employees and the state.

FISCAL EFFECTS

Estimating this measure's fiscal effects is subject to considerable uncertainty, largely depending on how employees and employers respond to the measure.

Reduced State Trial Court Costs on Net. This measure would result in reduced state trial court workload, as employees would no longer be able to file PAGA lawsuits in the trial courts. This reduction could be offset somewhat by increased workload in other types of cases. For example, trial courts could receive an increased number of appeals of Labor Commissioner decisions or an increased number of class-action lawsuits or other civil filings that otherwise would have been pursued as PAGA lawsuits. On net, the measure would result in reduced state trial court costs that could reach the low tens of millions of dollars annually. Resources freed up by the reduction would likely be redirected to other trial court activities.

Reduced State Revenue From Elimination of PAGA Penalties. In 2016-17, the state received $20 million in PAGA penalties from out-of-court settlements and trial awards. These payment amounts received by the state have grown notably in recent years. Under this measure, the state would no longer receive PAGA penalties, meaning the measure would result in reduced state revenue—potentially in the low tens of millions of dollars annually for labor law enforcement. This amount would be offset by an unknown, but likely small, amount of new penalty revenue associated with the measure's new additional penalty.

Likely Minor Net Impact on State Administrative Costs to Enforce Labor Laws. The measure would likely increase the number of wage claims received by the Labor Commissioner because some employees who would have been plaintiffs in PAGA lawsuits might instead file wage claims. As a result, the Labor Commissioner's Office would likely require additional resources to adjudicate this new workload. On the other hand, the Labor Commissioner's Office would no longer need to review and investigate PAGA lawsuit notices, resulting in newly available staff resources that could be redirected to other priorities. These effects would be offsetting to some degree. Overall, the measure likely would have minor net impact on state administrative costs related to labor law enforcement.

Summary of Fiscal Effects. We estimate that this measure would have the following fiscal effects:

- Net reduction in state trial court costs that could reach the low tens of millions of dollars annually.
- Reduction in state penalty revenue used for labor law enforcement in the low tens of millions of dollars annually.
- Likely minor net impact on state administrative costs to enforce labor laws.

Sincerely,

Mac Taylor
Legislative Analyst

Michael Cohen
Director of Finance