

# A Shrinking Toolbox: The Corporate Efforts to Eliminate PAGA and Limit California Workers' Rights

February 2024

**POWERSWITCH  
ACTION**



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**UCLA** Labor Center

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## Foreword

As the red hot labor summer<sup>1</sup> reminded us all, there is such incredible strength in numbers, in workers acting together for change. We've all felt it, with the exciting resurgence of workers protesting, unionizing, and striking. Collectively, workers are advocating for quality jobs, decent wages, and better economic opportunities, and pressing for stronger laws and meaningful consequences when employers don't follow the law. Waves of workers are taking it to the streets and raising their voices on matters of basic fairness. They are highlighting the gross unfairness of the deepening wealth divide that makes it virtually impossible to make ends meet for far too many across the nation.<sup>2</sup> And they are also rising up against the persistent push by big business to turn back the clock on hard-won worker victories fought to achieve some measure of equity—in collective bargaining agreements, in our courts, and in our legislatures.

While it has become increasingly unpopular to elevate profit over people, big business has resorted to disguising their regressive blows as somehow benefiting workers, rather than their financial bottom line. Case in point: the corporate machine misleading the public about a voter initiative that would eviscerate the Private Attorneys General Act ("PAGA"),<sup>3</sup> one of the most powerful tools that workers in California have to enforce basic labor standards. PAGA empowers workers to hold scofflaw employers accountable when they violate important worker protections—like the right to overtime, or the right to paid sick leave. Recognizing that the state labor enforcement agency is chronically and severely underfunded and under-resourced, PAGA enables workers to stand in the shoes of government enforcement officials by giving workers the ability to file lawsuits to collect monetary penalties on behalf of themselves and all co-workers whose rights have been flouted by a law-breaking employer, in order to deter future illegal conduct.<sup>4</sup>

1 See, e.g., O. Luppino, [12 of the biggest strikes during during this Hot Labor Summer](#), Salon (Sept. 4, 2023).

2 See S. Nabi, [Charts that Explain Wealth Inequality in the United States](#), Aspen Institute (2022); J. Lee, Here's why Americans can't stop living paycheck to paycheck, CNBC (Aug. 17, 2023).

3 Cal. Lab. Code, §§ 2698 et seq.

4 See Cal. Lab. Code, § 2699(a); *Kim v. Reins Int'l Cal. Inc.*, 9 Cal.5th 73, 81 (2020) ("Kim"). Under the California Labor Code, employers who violate labor standards may be liable to employees for damages and statutory penalties (such as waiting time penalties), and may also be separately liable to the state for additional civil penalties. See *Kim*, *supra*, 9 Cal.5th at 80. In 2003, the California Legislature enacted PAGA with the goal of enhancing the limited labor law enforcement resources of the state labor agency, by authorizing employees to enforce the Labor Code as private attorneys general who may seek civil penalties against employers on behalf of themselves and other current or former employees. See *Arias v. Superior Court*, 46 Cal.4th 969, 980–981 (2009). Under PAGA, 75 percent of any civil penalties recovered by the plaintiff employee are paid to the state labor agency; aggrieved



Critically, even workers blocked by forced arbitration clauses from participating in class actions can file PAGA suits.<sup>5</sup>



It is unsurprising that corporate special interest groups from industries with some of the highest rates of wage and hour violations have invested their time and money to sponsor the initiative to gut PAGA.<sup>6</sup> PAGA actually gives workers a

fighting chance in court to confront workplace-wide employer wrongdoing. Of course, labor law violators would rather not get caught because it can cost them, especially for pervasive misconduct. The initiative also helps them evade liability by undercutting workers' ability *outside* of court, through government enforcement efforts, to vindicate their rights. Meanwhile, big business has been spinning the fiction that the initiative protects workers, when in fact, it does the polar opposite.

In an attempt to cast PAGA as the enemy of workers, the corporate special interest groups behind the initiative conveniently ignore the essential role of PAGA in helping to level the playing field for both workers and law-abiding businesses—harmed alike by unscrupulous employers that try to game the system in order to gain a competitive advantage. Workers, and the world of responsible businesses trying to survive while others play dirty, need laws like PAGA to drive accountability for labor violations that don't rely solely on the engine of resource-starved government agencies.

As a non-profit attorney who litigated anti-sweatshop cases for almost 15 years on behalf of workers in low-wage industries, and later, in my decade of directing and shaping labor policy as senior advisor to both the California Labor Commissioner and California Labor Secretary before I joined Berkeley Law, I have seen the synergy of complementary forms of collective action—when workers fight together to advocate for their rights, when government works together with grassroots organizations to vigorously enforce worker protections, and when groundbreaking state laws like PAGA provide workers with a means to seek justice not just for themselves, but also for each other.

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employees receive 25 percent. See *Cal. Lab. Code*, § 2699(i); Kim, *supra*, 9 Cal.5th at 81 (citation omitted).

- 5 A PAGA action is not a class action because a PAGA plaintiff represents the state's Labor & Workforce Development Agency. See Kim, *supra* note 4, 9 Cal.5th at 87.
- 6 Sponsors of the ballot initiative include the California Chamber of Commerce, the California Restaurant Association, and Western Growers, to name a few. See [Who We Are](#), Californians for Fair Pay and Accountability, last visited Feb. 2, 2024. Research suggests that wage theft is particularly common in the agricultural and restaurant industries, with 70% of all investigated farm employers and 84% of all investigated restaurants reporting some kind of wage and hour-related violation. See D. Costa et al., [Federal Labor Standards Enforcement in Agriculture](#), Economic Policy Institute (Dec. 15, 2020), 1 (reporting violations found in federal labor standards investigations of farms conducted by the Wage and Hour Division (WHD) of the U.S. Department of Labor (US DOL)); S.A. Allegretto et al., [Twenty-Three Years and Still Waiting for Change](#), Economic Policy Institute. Briefing Paper #379, 18 (Jul. 2014) (reporting violations found in US DOL WHD investigations of restaurants).

Throughout my career in both the nonprofit and public sectors, I have learned some invaluable lessons about the most effective approaches not only to creating potent laws that advance the rights of workers, but also to making them accessible to workers on the ground. As a national standard-bearer of worker rights,<sup>7</sup> California has not only enacted a robust array of worker protections, including overtime for farmworkers, higher wages for health care and fast food workers, expanded paid sick leave, and anti-retaliation measures, to name just a few<sup>8</sup>—but the state has also codified essential enforcement mechanisms to give meaning to these rights, through private suits including PAGA complaints, as well as through government enforcement avenues.<sup>9</sup> During

my time at the state labor agency, we instituted important innovations in administrative practice to enhance our enforcement tools by maximizing the impact of strong laws and scarce agency resources—including targeted workplace investigations to root out illegal schemes aimed at denying workers their wages, and a strategic enforcement initiative launched in true partnership with community-based organizations to focus inspections on low-wage, high-violation industries in which workers are otherwise reluctant to step forward.

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### **PAGA actually gives workers a fighting chance in court to confront workplace-wide employer wrongdoing.**

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But I know all too well that the good laws we have in the books, and the effective procedures we devise to implement them, are only as good and effective as our capacity to actually put them into action. This is a collective charge, one that cannot be accomplished by government actors alone. Public resources are perennially inadequate to the task, especially given the millions of California workers in low-wage industries where labor abuse and exploitation are endemic.<sup>10</sup> Each stakeholder in enforcing labor rights—law-abiding employers, unions, community organizations, and workers and their legal advocates—invaluably augment and uniquely contribute to what government can do.

The corporate interests behind this initiative, however, would like us to ignore this truth.

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7 [Best and Worst States to Work in America 2023](#), Ox Fam, last visited Feb. 2, 2024 (ranking California as the state with the highest overall score in the nation based on the robust degree of protections in its wage policies, worker protections, and rights to organize).

8 [Sen. Bill. No. 1066](#) (2015–2016 Reg. Sess.) (overtime protections for farmworkers); [Sen. Bill No. 525](#) (2023–2024 Reg. Sess.) (increasing minimum wages for health care workers); [Assem. Bill. No. 1228](#) (2023–2024 Reg. Sess.) (increasing minimum wages for fast food workers); [Sen. Bill No. 616](#) (2023–2024 Reg. Sess.) (expanding paid sick leave); [Sen. Bill. No. 497](#) (2023–2024 Reg. Sess.) (creating a rebuttable presumption if the employer retaliates within 90 days of protected activity).

9 California’s system of administrative enforcement provides workers with two main avenues before the Labor Commissioner to recover unpaid wages and associated damages and penalties: individual wage claims filed by workers that may proceed to an informal hearing and result in administrative findings and an order (see Cal. Lab. Code, § 98), and workplace-wide investigations of employers that may result in citations against employers when violations are found (see Cal. Lab. Code, § 90.5). Workers may also file an administrative complaint if they are retaliated or discriminated against for speaking up for their rights—including complaining about wage theft, raising health and safety issues with the employer, or disclosing information to a government

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or law enforcement agency about unlawful activity (see Cal. Lab. Code, § 98.7).

10 See *infra* Part II.B.4 & Figure 6.

Workers will be better off, these industry groups assert, if they stopped bringing those pesky PAGA lawsuits in court. The initiative backers dangle the promise that in return, workers can simply avail themselves of government resources through the state Labor Commissioner to rectify unlawful acts of their employer, and get 100 percent of the monetary penalties that result.

This is nothing but smoke and mirrors. In reality, big business is rigging the system. Many workers whose rights have been violated may not even see a penny of what they are owed, because their employers have successfully locked the door to government enforcement through forced arbitration clauses that prevent workers from pursuing wage claims before the Labor Commissioner.<sup>11</sup> Moreover, rather than expand government best practices, such as strategic workplace investigations, that have increased the Labor Commissioner's efficacy, the initiative essentially allows law-breaking employers to duck a government investigation (as long as they are not already being investigated), opt for a "confidential consultation" instead, and avoid civil penalties (the thing that incentivizes employers to follow the law in the first place). It's not hard to imagine how this will be used and abused by dishonest businesses—as a sort of free pass that functions to eliminate any real check on worker exploitation—as soon as they have any inkling that workers are organizing to bring labor violations to light.

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11 See *infra* Part I.B.

Thus, if these changes become law, the majority of California's non-union, private sector workers could be left with no effective means to fight wage theft and other unlawful employer conduct. What's more, the initiative's impacts would fall heavily on workers of color and low-income workers who are more likely to be subject to forced arbitration clauses and are the hardest hit by wage violations.<sup>12</sup>

Through well-grounded empirical and statistical analysis, this report methodically exposes the fiction of the initiative. The report demonstrates that, contrary to what the initiative backers would have the public believe, PAGA has been an extremely potent tool for workers—which is exactly the reason why big business wants to kill it. Significantly, the report reveals the initiative for what it really is: a dangerous attempt by corporate special interests to co-opt workers in order to silence their collective voice and destroy access to justice beyond just PAGA itself. And in page after page of this report, we feel the remarkable courage, dedication, and perseverance of workers and their grassroots organizations, who continue to raise their voices and stand strong, with the facts and the truth on their side, in the ongoing march for fairness and justice.

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*\* The views expressed in this foreword are solely those of the individual author (institutional affiliation indicated for identification purposes only).*

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12 S. Shapiro et al., [Private Courts, Biased Outcomes](#), Center for Progressive Reform, 6 (Feb. 2022), 6.



## Executive Summary

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Despite having the strongest workplace laws in the nation, workers in California experience high rates of labor violations that disproportionately harm workers of color and workers in low-wage industries.<sup>13</sup>

Lawmakers created the Private Attorneys General Act (“PAGA”) in 2003 to broaden the state’s labor enforcement capacity.<sup>14</sup> Under PAGA, workers file lawsuits on behalf of the Labor & Workforce Development Agency (“LWDA”) for company-wide violations.<sup>15</sup> This report is the first to analyze the likely impact on workers of a ballot initiative that would dramatically alter California’s tools for preventing and correcting wage theft and other workplace abuses.<sup>16</sup> The report’s findings include:

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- <sup>13</sup> See, e.g., R. Milkman et al., [Wage Theft and Workplace Violations in Los Angeles](#), Institute for Research on Labor and Employment UCLA, 42–43 (finding that low-wage immigrant workers in Los Angeles experience minimum wage violations at twice the rate of their U.S.-born counterparts, and Latinos experience wage theft at nearly four times the rate of white workers); A. Bernhardt et al., [Broken Laws, Unprotected Workers](#), 26 (Sept. 21, 2009) (finding, in landmark study of more than 4,000 workers in Chicago, Los Angeles, and New York City, that “workplace violations are severe and widespread in low-wage labor markets”); *id.*, 42–43 (finding, in same study, that women are more likely to experience minimum wage violations, at a rate of 30 percent versus 20 percent for men, and that African American workers “had a violation rate three times that of white workers”).
- <sup>14</sup> Cal. Lab. Code, §§ 2698 et seq. See also Assem. Com. on Judiciary, [Analysis](#) of Sen. Bill No. 796 (2003–2004 Reg. Sess.), 4 (June 26, 2003) (noting that employers had been able to “violate the [Labor Code] with impunity”).
- <sup>15</sup> Cal. Lab. Code, § 2699.
- <sup>16</sup> Cal. Attorney General, [Ballot Measure Proposed Law](#), No. 21-0027A (Nov. 8, 2021) (“Ballot Measure Proposed Law”).



- The crisis of compliance in low wage industries will not be solved through state enforcement initiatives alone.
- **PAGA is crucial to enforce labor laws where workers have signed arbitration clauses.** We can infer this from Figure 2, which illustrates that PAGA filings have increased in direct proportion to the explosion in forced arbitration clauses since the early 2000s.
- PAGA amplifies the state’s strategic enforcement efforts. Between 2018 and 2021, worker whistleblowers have filed more than 4,208 PAGA notices with the LWDA in the following strategic high violation industries: agriculture, auto repair, car wash, garment, janitorial, restaurant, retail, and warehouse. This is nearly three times the number of inspections the Bureau of Field Enforcement was able to conduct during the same time period (Figure 3).
- PAGA liability creates a market incentive to comply with labor laws. Corporations are incentivized to invest in compliance with labor and employment laws when noncompliance presents a significant threat to their profits.<sup>17</sup> This is what PAGA does.

17 See generally A. Stansbury, [Do US Firms Have an Incentive to Comply with the FLSA and NLRA?](#), Peterson Institute for International Economics, 4–5 (Jun. 2021, Rev. Aug. 2021) (noting that under “[a] long tradition in economics appl[ying] a cost-benefit framework to decisions to comply with the law,” a “profit-maximizing company will comply with a law if the expected costs of non-compliance, if a violation is detected, exceed the extra profits the company can make if it does not comply”). See also J. Kim et al., [Wage Theft in the United States](#), The Center for Women and Work Working Paper Series, No. 2020-1, 9 (Jun. 2020) (stating that a “higher

PAGA creates a substantial risk that violations will both be discovered and be punished with meaningful penalties. By harnessing the capacity of private attorneys—who select strong cases because they only get paid if they prevail—PAGA helps California hold corporate giants to account.<sup>18</sup>

- PAGA penalties fund labor law outreach, public enforcement, and education. **Last fiscal year, PAGA generated \$209 million for the LWDA** (Figure 4).<sup>19</sup>
- PAGA suits address wage theft and other serious violations.<sup>20</sup> More than nine out of ten (91%) of PAGA claims allege wage theft, including overtime violations (79% of cases) and failure to pay for all hours worked (76% of cases).<sup>21</sup> A smaller but still significant share involves violations of earned sick leave rights (18%),

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cost of violation and a lower cost of compliance are related to a lower prevalence of wage theft”).

18 D. Freeman Engstrom, [Harnessing the Private Attorney General: Evidence from Qui Tam Litigation](#), 112 Columbia L. Rev. 1244, 1289–90 (Oct. 2012) (empirical analysis of over 4,000 qui tam suits showing that private attorneys efficiently screen meritorious cases and that their expertise minimizes enforcement costs).

19 Data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023, in response to Public Records Act Request.

20 Cal. Lab. Code, § 2699.5.

21 Authors’ analysis of data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023 in response to Public Records Act Request. For purposes of this analysis, the authors considered the following violation categories to be “wage theft”: failure to pay minimum wage, failure to pay overtime, failure to pay for all hours worked, failure to pay wages upon termination, other unpaid wages, and tip violations.



fraudulent misclassification of employees as independent contractors (11%) and retaliation (13%) (Figure 5).<sup>22</sup>

- PAGA suits, while critically important to labor standards enforcement, comprise less than 1% of state court cases.<sup>23</sup> In fiscal year 2022–2023, less than one percent of all civil cases were PAGA cases.<sup>24</sup>

Just as a carpenter reaching into a toolbox may select a hammer, chisel, or screwdriver depending on the job at hand, California’s workers need different tools to combat violations; yet, these tools are disappearing, and more will disappear if this initiative passes. These include (1) state agency enforcement, which includes both traditional complaint-based adjudications and a growing number of strategic enforcement investigations supported by community partnerships; (2) private enforcement by workers through collective bargaining agreements achieved with unions, or through courts by filing individual lawsuits and class actions; and (3) representative lawsuits under PAGA, in which worker whistleblowers partner with the state to bring workplace-wide lawsuits in the public interest.

One category of these tools—private enforcement—is already inaccessible to most workers due to low union density in the private sector and employer imposition of forced arbitration clauses.<sup>25</sup> **Now, employer groups have qualified a ballot initiative to eliminate**

## **PAGA and restructure agency enforcement.**<sup>26</sup>

This report examines whether workers will have sufficient mechanisms to fight abuse if that initiative were to pass. It finds that agency enforcement mechanisms have become more effective in recent years but are insufficient on their own to create a culture of compliance with workplace rights. **We conclude that PAGA remains an indispensable tool to supplement the Labor Commissioner’s capacity to combat labor violations.**

In particular, we find:

- Barriers to enforcement include lack of awareness, fear of retaliation, limited enforcement resources, and forced arbitration contracts signed by workers that preclude any legal claims.<sup>27</sup>
- Individualized enforcement through the Labor Commissioner’s wage claim process is necessary but not sufficient. The \$40 million recovered by workers in approximately 30,000 wage claims each year<sup>28</sup> represent roughly 2% of the

<sup>22</sup> *Ibid.*

<sup>23</sup> See *infra* note 165 and accompanying text.

<sup>24</sup> *Id.*; Judicial Council of California, [2024 Court Statistics Report: Statewide Caseload Trends](#), 3 (2024).

<sup>25</sup> See *infra* Part I.B.

<sup>26</sup> See, e.g., C. Lunde, [PAGA Reform Measure Officially Qualifies for 2024 California Ballot](#), Western Growers (Jul. 25, 2022) (stating “[o]ur membership stepped up in a big way to help fund the signature gathering campaign. Nearly 140 Western Growers members contributed \$1.4 million with another \$1.2 million coming from the association”); V. Antram, [California ballot initiative to repeal PAGA qualifies for 2024 ballot](#), Ballotpedia News (Jul. 26, 2022) (noting that, upon Secretary of State announcement that the initiative to repeal PAGA had qualified for the 2024 ballot, endorsers of the initiative included: the California Chamber of Commerce, Western Growers Association, California New Car Dealers Association, and the California Restaurant Association).

<sup>27</sup> See *infra* Part II.

<sup>28</sup> California Legislative Analyst’s Office, [The 2020–2021 Budget: Improving the State’s Unpaid Wage Claim Process](#), The California Legislature (Feb. 19, 2020) (“2020

\$2 billion per year it is estimated that California workers lose to wage theft.<sup>29</sup>

- Strategic enforcement is a cost-effective, systemic solution that is nevertheless insufficient as a stand-alone solution. Partnering with community organizations to target high-violation workplaces and yield quality evidence, **strategic enforcement has tripled the number of violations found per investigation since its implementation in 2010 and increased the dollar value of citations per investigation by 50-fold**, from \$1,402 per inspection in 2010 to an average of \$70,007 per inspection.<sup>30</sup> However, the agency inspects 500 workplaces annually—less than .05% of California’s 1.2 million employers.<sup>31</sup>

This report examines PAGA, and the impact of its potential repeal, in the context of forced arbitration clauses that now prevent approximately eight in ten workers from filing a lawsuit or joining a class action.<sup>32</sup> For

these workers, PAGA provides irreplaceable access to justice. The Labor Commissioner’s wage claim adjudication process is an **illusory alternative**, as employers have also succeeded in using forced arbitration clauses to bar workers from participating in wage claim proceedings.<sup>33</sup> In addition to eliminating PAGA, the initiative would substantially hinder the Labor Commissioner’s core functions and most effective innovations. The ballot initiative would:

- **Undermine the Labor Commissioner’s most promising enforcement efforts** by limiting the agency’s ability to implement community-based enforcement programs. According to the state, these programs have “uncovered violations assessing more wages owed to workers than at any other time in the [agency’s] history.”<sup>34</sup> In the wake of these worker victories, employers are now seeking to put a stop to these successes. The ballot initiative would limit the state’s ability to contract with non-governmental entities, including community-based organizations, and discourage information sharing between the Labor Commission and such organizations during ongoing investigations.
- “[A]llow employers to correct identified labor-law violations without penalties,”<sup>35</sup> thereby creating new loopholes for lawbreaking employers.

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LAO Unpaid Wage Claim Report”).

29 D. Cooper et al., [Employers steal billions from workers’ paychecks each year](#), Economic Policy Institute, 10 (May 10, 2017).

30 California Labor Commissioner’s Office, [2017–2018 Fiscal Year Report on the Effectiveness of the Bureau of Field Enforcement](#), 9 (“2017 BOFE Report”); California Labor Commissioner’s Office, [2020–2021 The Bureau of Field Enforcement Fiscal Year Report](#), 9–10 (2021) (average of last three years of reported data) (“2020 BOFE Report”).

31 2020 BOFE Report, *supra* note 30, 4. This inspection number excludes audits that the Labor Commissioner conducts on publicly funded “public works” construction projects. See California Employment Development Department, [Table: California Firms and Employment by Size Range 2022 Q4](#), last visited Feb. 2, 2024.

32 K. Hamaji et al., [Unchecked Corporate Power](#), Center for Popular Democracy, 1 (May 2019) (analysis showing

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that by 2024, more than 80 percent of private sector nonunion workers will be blocked from court by forced arbitration clauses with class- and collective-action waivers).

33 See *infra* Part I.B.

34 2020 BOFE Report, *supra* note 30, 9.

35 Cal. Attorney General, [Title and Summary, Ballot Measure Proposed Law](#), No. 21-0027A1 (Dec. 8, 2021) (“Ballot Measure Title and Summary”).



- Mandate that an understaffed agency painstakingly address consultation and advice inquiries from employers, effectively redirecting front-line staff into employer-servicing programs unlikely to improve compliance with workplace laws.<sup>36</sup>
- **Exacerbate budget challenges** by reducing revenue to the state by approximately \$200 million per year and increasing state costs by upwards of \$100 million per year.<sup>37</sup>

In an age of increasing corporate concentration and rapidly growing economic inequality, California has led the way in lifting up legal protections for workers and in developing innovative and effective policies that aid workers in understanding and enforcing their rights. That powerful corporations and employers would seek to undo the hard-won gains that immigrant workers, workers in low-wage industries, and other workers vulnerable to exploitation have gained, is not surprising. Californians need to do more—not less—to support safe and dignified work for all.

<sup>36</sup> See *infra* Part II.C.2.

<sup>37</sup> See Ballot Measure Title and Summary, *supra* note 35 (noting “[l]ikely increase in state costs to enforce labor laws that could exceed \$100 million per year”). Loss of \$200 million in annual revenue derived from data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023, in response to Public Records Act Request.





## I. California's Workplace Rights Enforcement Systems Are Overwhelmed and Have Been Under Sustained Attack

California's labor laws are a beacon for the nation. The Golden State has led the way in raising wages, establishing sick leave, and tailoring protections in low-wage industries like fast food, janitorial services, long-term care, garment work, carwash, agriculture, and domestic work.<sup>38</sup> The state has also broken new ground in enacting policies to hold lawbreaking employers accountable, ranging from joint liability to wage liens, protections against immigration-related retaliation, and facilitating local labor law enforcement.<sup>39</sup> But the scale of labor violations has long dwarfed our state's collective capacity to enforce them.

38 See Sen. Bill No. [62](#) (2021–2022 Reg. Sess.) (establishing “Garment Worker Protection Act,” making California the first state to require hourly wages for garment workers); Assem. Bill No. [1066](#) (2015–2016 Reg. Sess.) (making California the first state to require overtime wages for farmworkers); Assem. Bill No. [241](#) (2013–2014 Reg. Sess.) (enacting “Domestic Worker Bill of Rights”); Assem. Bill. No. [1387](#) (2013–2014 Reg. Sess.) (requiring a bond of \$150,000 as a condition of obtaining a license or permit to operate a car wash to protect against wage theft).

39 Cal. Lab. Code, § 2810.3(b) (stating that a company using a third party to supply its workers “shall share ... all civil legal responsibility and civil liability” for any unlawful failure to pay “wages” and for failure to secure workers’ compensation insurance for the third party’s workers); *id.*, § 238.3 (authorizing Labor Commissioner to create a lien on any personal property of an employer for the full amount of any wages, interest, and penalties claimed to be owed to any employee); *id.*, § 1019 (making it unlawful to engage in “unfair immigration-related practices” against any person for the purpose of retaliating against that person for exercising rights under the Labor Code or local ordinances related to employees); *id.*, § 226.8 (expanding authority of local public attorneys to enforce California’s Labor Code).



Today, one-in-three Californians works in a low-wage job, and thus, is disproportionately likely to be a victim of wage theft.<sup>40</sup> As the Legislature has often recognized, wage theft in California remains rampant.<sup>41</sup> Data show nearly 600,000 California workers are robbed of nearly \$2 billion in minimum wage violations each year.<sup>42</sup> Wage theft is particularly prevalent in sectors where immigrants, workers of color, youth, and women comprise the majority of the workforce, including low-wage industries such as hospitality, restaurants, fast food, agriculture, residential construction, retail, homecare, and domestic work.<sup>43</sup>

Historically, union organizing has been one of workers' main tools to enforce their rights.<sup>44</sup> Unionized workers directly set standards and combat violations using grievance procedures and collective bargaining.<sup>45</sup> Decades of corporate hostility to unions,<sup>46</sup> however, combined with a United States Supreme Court that consistently rules in favor of corporations,<sup>47</sup> have resulted in less than one in five (16%) of Californians belonging to a union.<sup>48</sup> Most workers must rely on other tools to secure their rights.

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- 40 [RELEASE: Low-Wage Work in California Data Explorer](#), UC Berkeley Labor Studies Center (May 12, 2022) (finding that “one out of every three working Californians has a low-wage job, totaling 4.3 million low-wage workers”); San Francisco Wage Theft Task Force, [Final Report](#), 3 (2013) (highlighting that “[n]ational and local studies report that wage theft is a pervasive problem that disproportionately affects immigrant and low-wage workers”).
- 41 See, e.g. Sen. Com. on Labor, Public Employment, and Retirement, [Analysis](#) of Assem. Bill No. 594 (2023–2024 Reg. Sess.), as amended May 18, 2023, 4 (noting that “between 2017–2018, 90% of businesses inspected by a state agency were found to be out of compliance with worker classification laws, resulting in \$7.8 million assessed in lost wages”); Sen. Com. on Labor, Public Employment, and Retirement, [Analysis](#) of Assem. Bill No. 1003 (2021–2022 Reg. Sess.), as amended, May 4, 2021, 2; Little Hoover Commission, [Level the Playing Field](#), Report # 226, Mar. 2015, ii (estimating “[t]he underground economy robs the state of an estimated \$8.5 billion to \$10 billion in uncollected tax revenue”).
- 42 D. Cooper et al., *supra* note 29, 10 (May 10, 2017).
- 43 M. Bennett, [Close to Home: Tracking the Cost of Wage Theft](#), *Press Democrat* (Sept. 3, 2023); S. Feriss et al., [Wage Theft Hits Immigrants—Hard](#), *The Center for Public Integrity* (Oct. 14, 2021); J. Entmacher et al., [Unpaid & Overloaded: Women in Low-Wage Jobs](#), *National Women’s Law Center*, 33 (2014).

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- 44 See, e.g., K. Bahn et al., [Unions and the enforcement of labor rights](#), Washington Center for Equitable Growth (Apr. 29, 2022) (discussing how organized labor protects U.S. workers against unfair and illegal employment practices).
- 45 U.S. Dept. of Labor, [4 Ways Unions Complement the Department of Labor’s Mission](#) (Aug. 18, 2022); K. Bahn et al., [Unions and the Enforcement of Labor Rights](#), Washington Center for Equitable Growth (Apr. 29, 2022).
- 46 C. McNichols et al., [Employers spend more than \\$400 million per year on union avoidance](#), Economic Policy Institute (Mar. 29, 2023); S. Hunter, [Snapshot of California Union Membership](#), UC Berkeley Labor Studies Center (Aug. 29, 2023) (noting that only 10.6% of private sector workers in California are covered by collective bargaining agreements despite public support for unions being at its highest point since the mid-1960s).
- 47 L. Epstein et al., [A Century of Business in the Supreme Court, 1920–2020](#), Abstract, 107 Minn. L. Rev. Headnote 2022 (Feb. 26, 2023), Virginia Public Law and Legal Theory Research Paper No. 2022-55, Virginia Law and Economics Research Paper No. 2022-16 (finding that the win rate for business in the Roberts Court, (63.4%) is 15 percentage points higher than the next highest rate of business wins over the past century (the Rehnquist Court, at 48.3%)).
- 48 See S. Hunter, [Snapshot of California Union Membership](#), UC Berkeley Labor Center (Aug. 29, 2023).

Outside of collective bargaining, California’s worker rights enforcement landscape consists of three major components: (1) **enforcement by the Labor Commissioner**, which includes both traditional, complaint-based adjudications and a growing number of investigations in high-violation industries supported by community partnerships; (2) private enforcement by workers through **individual and class action lawsuits**; and (3) **PAGA actions**, in which worker whistleblowers partner with the state to bring workplace-wide lawsuits in the public interest. Each of these play important and complementary roles in our enforcement ecosystem. Yet none, standing alone, are sufficient to create a culture of compliance and enforce workers’ rights.

## A. Labor Commissioner Enforcement Alone Is Not Sufficient

The Office of the Labor Commissioner is tasked<sup>49</sup> with enforcing the state’s wage theft, anti-retaliation, and child labor laws, among others. The office has two branches to address wage theft: a Wage Claim Adjudication Unit for individual wage claims and a Bureau of Field Enforcement (“BOFE”) for company-wide investigations.

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49 In this report, the terms “Labor Commissioner,” “Labor Commissioner Office,” “Division of Labor Standards Enforcement,” and “DLSE” are used interchangeably.

## 1. The Limits of Individual Wage Claims

Most workers who seek justice through California’s Labor Commissioner do so by filing individual wage adjudication claims.<sup>50</sup> Each year, roughly 30,000 workers file wage claims at the Labor Commissioner’s sixteen regional offices.<sup>51</sup> These claims are heard in administrative “Berman” hearings (named for the state senator who created them),<sup>52</sup> which are less formal than court.<sup>53</sup> Deputy Labor Commissioners preside over the hearings, and either party may appeal the decision in civil court.<sup>54</sup> The vast majority of workers who experience wage theft, however, suffer in silence.

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50 This report focuses on enforcement issues related to the DLSE, since this is the agency that is primarily targeted by the ballot initiative. But many of the same broader enforcement trends and needs also apply to other state and local enforcement agencies. See, e.g., C. Fisk et al., [California Co-Enforcement Initiatives that Facilitate Worker Organizing](#), Harvard Law & Policy Review: Labor Law Reform Symposium (2018) (discussing complaint-based and strategic enforcement in the context of San Francisco’s Office of Labor Standards Enforcement); The Workers Lab, [Building a Strategic Partnership for OSH Enforcement](#) (Summer 2020) (describing how the Labor Occupational Health Program of the University of California Berkeley will work to promote a strategic enforcement partnership between workers’ rights organizations and Cal/OSHA).

51 2020 LAO Unpaid Wage Claim Report, *supra* note 28.

52 *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1128 (2013) (“*Sonic-Calabasas II*”).

53 *Post v. Palo/Haklar & Associates*, 23 Cal 4th 942, 947 (2000). See also Cal. Code Regs., tit. 8, §§ 13502, 13506.

54 Cal. Lab. Code, § 98.2. Dept. of Industrial Relations, [Wage Claim Adjudication](#), Labor Commissioner’s Office, last visited Feb. 2, 2024 (for more detailed information on the wage claim adjudication process); 2020 LAO Unpaid Wage Claim Report, *supra* note 28.

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**Although individual wage claim adjudication has an important role to play, it is only one component in a larger array of legal enforcement mechanisms, all of which must be in place for the system to function.**

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Thirty thousand individual claims each year reflect a tiny percentage of the state's workers—only about 1 in 600, “even though the share of workers owed unpaid wages likely is much greater.”<sup>55</sup> Complaint-driven enforcement can never reveal the full scale of noncompliance because often the most vulnerable workers are the least likely to file complaints.<sup>56</sup> First, workers who do not know their rights will not file complaints; awareness of workplace rights is especially low among immigrants and low-wage workers, who are more likely to work in high-violation industries.<sup>57</sup> Second, the threat of retaliation looms large for workers in high-violation industries due to race, income, immigration status, and other factors.<sup>58</sup> For many of these

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<sup>55</sup> *Id.*

<sup>56</sup> J. Fine et al., [Strategic enforcement and co-enforcement of U.S. labor standards are needed to protect workers through the coronavirus recession](#), Washington Center for Equitable Growth (Jan. 14, 2021) (“Strategic Enforcement”).

<sup>57</sup> R. Deutsch & T. Gerstein, [Power In Partnership](#), Economic Policy Institute, 10 (Jun. 8, 2023) (“Power in Partnership”); N. Rankin et al., [Expanding Workers’ Rights: What It Means for New York City’s Low-Income Workers](#), Community Service Society, 14 (Jan. 2018).

<sup>58</sup> I. Tung et al., [Just Cause Job Protections](#), National Employment Law Project, ii (Apr. 2021) (noting that workers of color face higher rates of wage theft and workplace health and violations, but that fear of retaliation chills Black and Latino workers in particular from speaking up); P. Brown et al., [Farmworker Health](#)

workers, coming out of the shadows to file an individual complaint, “could mean no job, no home, and immediate loss of the right to work in the United States.”<sup>59</sup>

Professor Janice Fine, who has been a leader in training government agencies on effective enforcement, explains: “Whenever we start working with an agency, at the state or local level, we say to them: **“Your job is not to play whack-a-mole. . . .** We want them to see individual complaints not as the end, but as indications of something deeper—to see how they often connect to broader problems.”<sup>60</sup> Although individual wage claim adjudication has an important role to play, it is only one component in a larger array of legal enforcement mechanisms, all of which must be in place for the system to function.

## **2. Bureau of Field Enforcement: High-Impact Investigations, but Not at Scale**

Labor agencies have begun incorporating proactive investigation strategies to address some of the limitations of complaint-driven enforcement. In 2003, lawmakers created the Labor Commissioner’s Bureau of Field

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[in California](#), Community and Labor Center, UC Merced, 38–39 (finding, in a statewide survey of California farmworkers, that of the 33% of farmworkers who said they would not be willing to file a report on an employer if they witnessed noncompliance, 64% said the reason was due to fear of retaliation).

<sup>59</sup> C. Rice, Counsel of Record, for California Rural Legal Assistance as [Amicus Curiae](#) in Support of Respondent, 1 (Mar. 9, 2022) *Viking River v. Moriana*, 142 S.Ct. 1906 (2022) (“CRLA Viking River Amicus”).

<sup>60</sup> J. Fine et al., [A Grassroots Government](#), Boston Review (Nov. 2, 2023).

Enforcement (“BOFE”)<sup>61</sup> to investigate allegations of systemic labor violations across entire workplaces, including multiple worksites. Utilizing an approach referred to as “strategic enforcement,”<sup>62</sup> BOFE focuses on low-wage, high-violation, low-complaint industries—such as the agricultural, car wash, construction, garment, janitorial, restaurant, residential care, and warehouse sectors—in which violations are more frequent and severe but wage theft has been particularly hard to combat, due to workers’ fear of retaliation from filing an individual complaint and other factors.<sup>63</sup>

To address barriers to bringing violations to light, BOFE partners with key stakeholders, such as nonprofit community organizations and industry representatives, who can serve as the agency’s “eyes and ears.”<sup>64</sup> These collaborative strategic enforcement efforts, or “community enforcement” partnerships,<sup>65</sup> have contributed

to what the Labor Commissioner has described as **“high-quality, in-depth investigations that have uncovered violations assessing more wages owed to workers than at any other time in the [agency’s] history[.]”**<sup>66</sup>

Since 2010, when BOFE began partnering with stakeholders to identify lawbreaking employers, **the number of violations the agency found per investigation has more than tripled** from 49% to an average of over 150% in the last three years of reported data.<sup>67</sup> During the same period, the amount of unpaid wages recovered per inspection has also soared nearly fifty times from \$1,402 to an average of \$70,007.<sup>68</sup>

BOFE’s strategic enforcement program has achieved significant worker victories that have put entire industries on notice.<sup>69</sup> But BOFE’s resources are severely limited. In the last three years, **BOFE has completed an average of 570 worksite inspections per year, or less than .05% of the over 1.2 million employers statewide.**<sup>70</sup> In other words, it would take BOFE more than 2,200 years to inspect every California

61 Cal. Labor Code, § 90.5(c). California Assem. Bill No. 749, which took effect on January 1, 2003, established a field enforcement unit, which is now known as BOFE. (Assem. Bill No. [749](#) (2001–2002 Reg. Sess.)).

62 D. Weil, [Creating a strategic enforcement approach to address wage theft](#), J. of Indus. Relations, 4–5, 20 (2018).

63 A. Lazo et al., [To fight wage theft California gets strong assist from workers centers](#), Cal Matters (Nov. 5, 2022, updated May 2, 2023) (listing targeted low-wage industries). See also 2020 BOFE Report, *supra* note 30, 3 (describing how BOFE “focuses on major underground economy industries in California with the most rampant labor law violations” and “has increased its focus on industries where wage theft has been particularly challenging to combat”); J. Esbenshade et al., [Confronting Wage Theft](#), San Diego State University, 9, 16 (2017) (surveying 305 workers in the San Diego Labor Commissioner’s Office and over the telephone, concluding that “fear of retaliation is still the largest barrier to filing wage theft complaints”).

64 2020 BOFE Report, *supra* note 30, 3.

65 *Power in Partnership*, *supra* note 57, 6.

66 2020 BOFE Report, *supra* note 30, 3.

67 2017 BOFE Report, *supra* note 30, 8; 2020 BOFE Report, *supra* note 30, 9.

68 2017 BOFE Report, *supra* note 30, 9; 2020 BOFE Report, *supra* note 30, 9–10.

69 2020 BOFE Report, *supra* note 30, 3. See also *infra*, “BOFE Case Sends Ripples Through High-Violation Industry”.

70 2020 BOFE Report, *supra* note 30, 4. Analysis of three years of most recent, publicly available data (FY 2018–FY 2021.) This inspection number excludes audits that the Labor Commissioner conducts on publicly funded “public works” construction projects. See California Employment Development Department, [Table: California Firms and Employment by Size Range 2022 Q4](#), last visited Feb. 2, 2024.



employer once.<sup>71</sup> No matter how effective strategic interventions may be, the crisis of compliance in low-wage industries will not be solved by BOFE enforcement initiatives alone.

## B. Individual and Class Action Lawsuits: Door to Justice Closed by Arbitration

Given the long-standing scarcity of government enforcement resources, workers—and in particular, non-union and low-wage workers—have traditionally relied on class actions to enforce their rights.<sup>72</sup> Class actions use power in numbers: while each worker’s individual lawsuit may be smaller than the cost of legal representation, aggregating these claims into one action enables an attorney to vigorously pursue their case.<sup>73</sup>

In the last twenty years, however, the power of individual and class action lawsuits has been dramatically reduced by legal language that companies hide in the fine print of their employment contracts.<sup>74</sup> In a series of decisions beginning in 1991, the United States Supreme Court blessed the legality of what are referred to as **“forced arbitration clauses.”**<sup>75</sup> Under these clauses, as a condition of taking

a job, workers must give up their right to go to court and instead submit any legal claims that might arise against their employer to arbitration, a process that overwhelmingly favors the employer.<sup>76</sup> In 2018, the United States Supreme Court dealt yet another blow to workers’ rights when, in *Epic Systems*, it approved the use of forced arbitration clauses to prohibit workers from participating in class actions, as well as individual lawsuits.<sup>77</sup> Courts have also ruled that forced arbitration clauses can be used to prevent workers from pursuing individual wage adjudication claims through the Labor Commissioner.<sup>78</sup>

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71 The probability of BOFE inspecting any one firm each year is .00044 (570/1,289,975). Firm is defined as an establishment or a combination of establishments defined by a unique Employer Identification Number.

72 N. Ruan, *What’s Left to Remedy Wage Theft*, 2012 Mich. St. L. Rev. 1103, 1115–1125 (2012) (describing the role of class actions in protecting against wage theft).

73 *Id.*, 1115–1116.

74 H. Hafiz et. al, *Labor Market Regulation and Worker Power*, 90 U. Chicago L. Rev. 469, 493 (2023).

75 A. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute, 1 (Apr. 6, 2018).

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76 See *infra* “Forced Arbitration: Alternative dispute resolution, or claim suppression?”

77 See *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018); see also *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019) (holding that even an ambiguous arbitration clause can be construed to prevent a worker from arbitrating their claims on a class-wide basis).

78 In 2011, the California Supreme Court ruled that workers have an unwaivable right to pursue wage claims through a Berman hearing, even in the face of a forced arbitration clause to the contrary. See *Sonic-Calabasas v. Moreno*, 51 Cal.4th 659, 671–72 (2011) (“*Sonic-Calabasas I*”). However, the United Supreme Court, at the urging of industry groups like the Chamber of Commerce, struck down this ruling. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); R. Englert, Counsel of Record, for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, Aug. 9, 2010, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). In a subsequent case, the California Supreme Court was forced to concede that, in light of federal law, California workers did not have an unwaivable right to a Berman hearing after all. See *Sonic-Calabasas II*, *supra* note 52, 57 Cal.4th at 1124–1125. Workers may still, however, legally challenge such waivers on unconscionability grounds, but the outcome of that challenge will be context-dependent and could be subject to lengthy litigation. See *Oto v. Kho*, 8 Cal. 5th 111 (2019).

## Forced Arbitration: Alternative Dispute Resolution, or Claim Suppression?

Forced arbitration—in which, just by taking a job, workers give up their right to go to court—has been described by legal scholar Cynthia Estlund as “less as a mechanism of ‘alternative dispute resolution,’ than as an ex ante waiver of legal rights by employees.”<sup>79</sup> With the power to write the rules governing how and when claims can be asserted, employers have designed arbitration systems to suppress claims and evidence of lawbreaking.<sup>80</sup> Arbitrators have every incentive to rule in the employer’s favor or provide far weaker remedies than workers would otherwise win in court.<sup>81</sup> Because arbitration is a private,

closed dispute-resolution system, it does not result in the creation of public, binding precedent that establishes rules to be followed in future cases.<sup>82</sup> Unlike lawsuits, which are public proceedings, claims that are brought in arbitration do not trigger public scrutiny or pressure for companies to change their practices.

Research shows arbitration has suppressed workers’ demands for justice. Professor Estlund estimates that just 2% of workers with legal claims pursue them when arbitration is their only option, with the remaining 98% of claims disappearing into the legal equivalent of a black hole.<sup>83</sup>

79 C. Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 703 (2018).

80 See generally J. Silver-Greenberg et al., *Arbitration Everywhere, Stacking the Deck of Justice*, *The New York Times* (Oct. 31, 2015) (a multi-part series demonstrating how employers write favorable rules and design internal arbitration systems to ensure beneficial outcomes regarding employment disputes).

81 *Id.* (documenting how employers, as repeat players in the arbitration business, benefit from private arbitrators who decide claims favorably for the employer in order to ensure recurring business and referrals). See also K. Stone et al., *The Arbitration Epidemic*, Economic Policy Institute, 20 (Dec. 7, 2015) (documenting the lower win rates and smaller money judgments workers receive in arbitration compared to the same claims adjudicated in court).

82 L. Hamilton-Krieger, *Message In a Bottle*, 39 Berkeley J. of Employment & Labor Law 53, 76–78 (2018).

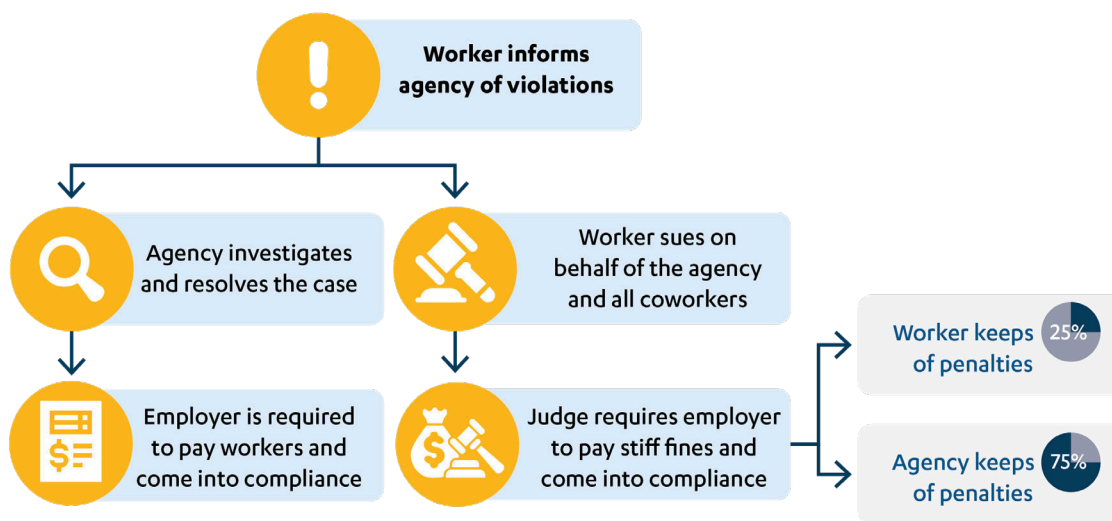
83 C. Estlund, *supra* note 79, 696 (finding that under 2% of the employment claims one would expect to find in some forum, but are covered by forced arbitration clauses, ever enter the arbitration process); K. Stone et al., *supra* note 81, 21 (finding plaintiffs’ overall economic outcomes are on average 6.1 times better in federal court and 13.9 times better in state court than in forced arbitration).

Researchers estimate that the current number of private-sector, non-union workers subject to forced arbitration clauses may be as high as 80%,<sup>84</sup> and that **as a result of forced arbitration, in 2019 alone, California workers lost \$850 million dollars in stolen wages.**<sup>85</sup> America’s workplace enforcement regime depends largely on workers’ ability to join together, sue wrongdoers, and to raise the costs of noncompliance so that employers are incentivized to comply with the law rather than risk getting caught.<sup>86</sup> With the vast majority of workers now subject to forced arbitration clauses and class action waivers, businesses have vastly increased their ability to insulate themselves from liability in workers’ class action suits, eroding what has historically been a primary tool to enforce workers’ rights.<sup>87</sup>

### C. Private Attorney General Act (“PAGA”): One of the Few Remaining Enforcement Tools With the Power to Change Corporate Behavior

In an era of forced arbitration and limited public enforcement resources, PAGA is one of the few remaining avenues for workers to collectively assert their rights and access the courthouse door. PAGA was designed to expand the state’s enforcement capabilities by deputizing worker whistleblowers to bring the kinds of workplace-wide lawsuits for civil penalties that previously only the state could bring on its own.<sup>88</sup>

Figure 1: Under PAGA, the Agency Investigates or Permits Workers to Pursue Action



84 K. Hamaji et al., *supra* note 32, 1.

85 H. Baran et al., *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket \$9.2 Billion in 2019 from Workers in Low Paid Jobs*, National Employment Law Project (Jun. 7, 2021).

86 J. Fine, *New Approaches to Enforcing Labor Standards*, Univ. of Chi. Legal Forum, 144 (2017).

87 G. Maatman Jr., *18th Annual Workplace Class Action Litigation Report, 2022 Edition*, Seyfarth Shaw LLP (2022), 23 (“The latest class action litigation statistics show that, over the past five years, motions to compel arbitration have become an increasingly effective defense to class action lawsuits, particularly since *Epic Systems*.”)

88 For further background information on PAGA’s legislative history, procedural requirements, and impact, see R. Deutsch et al., *California’s Hero Labor Law*, UCLA Labor Studies Center (Feb. 2020) (“*Hero Labor Law*”).

The Legislature enacted PAGA to better **deter violations**, so that fewer workers need to fight their employers for their rightfully earned wages.<sup>89</sup> PAGA suits vindicate the public interest by promoting compliance with workplace rights.<sup>90</sup>

PAGA is designed “to punish employers that have engaged in wrongdoing, not to compensate individual employees for damages sustained.”<sup>91</sup> As a result, a majority (75%) of civil penalties collected in private PAGA suits are deposited into a dedicated state fund—the Labor & Workforce Development Fund (“LWDF” or “PAGA Fund”)—for labor and employment education and enforcement purposes.<sup>92</sup> **In fiscal year 2022-2023 alone, PAGA generated over \$200 million in civil penalties.**<sup>93</sup>

Thus, in addition to fostering compliance, PAGA generates significant revenue to strengthen state agencies’ enforcement capacity. PAGA penalties provide vital funding that the state has used to conduct investigations, as well as to launch outreach and education programs to small and mid-sized employers as well as to some of the most vulnerable and hard-to-reach workers.

As California Attorney General, the state’s chief law enforcement officer, explained in an amicus brief to the U.S. Supreme Court: **“PAGA is a critical part of California’s efforts to promote the rights of workers . . . [W]e all benefit when the State is able to ensure robust enforcement of our labor laws.”**<sup>94</sup>

PAGA harnesses the knowledge of worker whistleblowers and the expertise, time, and resources of plaintiff-side attorneys to bring public workers rights’ enforcement actions, producing far more enforcement capacity and corporate accountability than the state could achieve on its own.



89 See, e.g., Assem. Com. on Judiciary, [Com. Analysis](#) of Sen. Bill No. 796 (2003–2004 Reg. Sess.), 5 (Jun. 26, 2003) (noting that, at the time, worker-initiated lawsuits could achieve “injunctive relief and restitution, which the sponsors say is not a sufficient deterrent to some labor violations”). The Committee Analysis also stated that “some provisions of the Labor Code have criminal penalties but no civil penalties,” but because prosecutors rarely pursue criminal charges for labor violations, “employers may violate the law with impunity.” (*Id.*, 3–4.)

90 M. Humenik, Counsel of Record, for the State of California’s Labor & Workforce Development Agency as [Amicus Curiae](#) in Support of Respondent, Mar. 9, 2022, 22, *Viking River v. Moriana*, 142 S.Ct. 1906 (2022), citing *ZB, N.A. v. Superior Ct.*, 448 P.3d 239, 250–51 (Cal. 2019).

91 Rob Bonta, Attorney General et al., for California as [Amicus Curiae](#) in Support of the Respondent, 18, *Viking River v. Moriana*, 142 S.Ct. 1906 (2022) (“Cal. AG Viking River Amicus”), 12.

92 Cal. Lab. Code, § 2699(i).

93 E. Karl et al., [Making Rights Real](#), Center for Popular Democracy, 16 (Nov. 28, 2023).

94 Cal. Dept. of Justice, Office of the Attorney General, [Attorney General Bonta Files Amicus Brief in Support of Workers’ Rights Under the Private Attorney General’s Act](#), Press Release (Mar. 9, 2022) (“Cal. AG Viking River Press Release”).



## PAGA and Justice for Farmworkers

Since 2020, farmworkers have brought more than 500 lawsuits under PAGA.<sup>95</sup> These lawsuits have helped turn the tide in an industry in which workers have long labored in a “shroud of silence” that has prevented labor law violations from coming to light.<sup>96</sup> In June 2023, Vino Farms, one of Sonoma County’s largest vineyard management companies, settled a PAGA suit alleging that it had failed to pay minimum wage and overtime.<sup>97</sup> As publicly reported, the \$1.4 million settlement provides \$800,000 or about \$1,500 each to 537 farmworkers, including \$500 for unpaid wages and \$1,000 for penalties and interest.<sup>98</sup> In 2019, Fresh Harvest Inc. and Seco Packing agreed to pay \$1 million to settle a PAGA claim brought by 582 lettuce harvesters and packers. The workers alleged that the

companies had failed to pay minimum wages and overtime and terminated the named plaintiff when, while being interviewed for an internal company investigation, she truthfully responded that the forewoman did not allow the crew to take mandatory scheduled breaks.<sup>99</sup> The \$1 million settlement included more than \$740,000 in payments to plaintiff farmworkers.<sup>100</sup> As California Rural Legal Assistance, one of the state’s largest and long-standing providers of non-profit legal services to farmworkers explains, “CRLA has recovered tens of millions of dollars in wages, damages and penalties for violations of California’s basic labor law protections and, put money back into the pockets of the workers who raise or serve our food, clean our businesses and care for our aged. **PAGA has proved an effective, and often the only, mechanism for bringing these claims.**”<sup>101</sup>

95 Data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023 in response to Public Records Act Request.

96 See J. Lurie, *Everyone Is Tired of Always Staying Silent*, Mother Jones (Jan./Feb. 2021); C. Cabrera-Lomeli, *Blacklisted for Speaking Up*, KQED (Jun. 30, 2022) (describing pervasive retaliation experienced by California farmworkers).

97 P. Martin, ed., *California: Farm Employment*, Rural Migration News, Univ. of California Davis, v. 29, no. 4, (Oct. 2023); J. Hay, *Vino Farms vineyard management company to pay \$1.4 million to settle lawsuit over worker pay, breaks*, The Press Democrat (Jul. 14, 2023).

98 P. Martin, *supra* note 97.

99 K. Dailey, *Farmworkers Settle California Wage Claims for \$1 Million*, Bloomberg Law, Nov. 27, 2019; *Order Granting Joint Motion for Approval of Settlement, Olivo et al. v. Fresh Harvest Inc. et al.*, No. 3: 2017-cv-02153 (S.D. Cal. 2019), Doc. No. 78 (Nov. 25, 2019) (“Olivo Settlement Order”).

100 *Olivo Settlement Order, supra* note 99, 4.

101 CRLA *Viking River Amicus, supra* note 59, 1.



## II. The Impact of the Ballot Initiative

If the three components of California’s labor law enforcement landscape—enforcement by the Labor Commissioner, individual and class action lawsuits, and PAGA actions—can be envisioned as a three-legged stool, employers have introduced a far-reaching ballot initiative that would severely undermine one leg (enforcement by the Labor Commissioner) and fully eradicate another (PAGA actions). The one remaining component—individual and class action lawsuits—would leave workers with barely a leg to stand on, given the endemic use of forced arbitration agreements.

Initiative proponents argue that eliminating PAGA and restructuring agency enforcement offers workers “a better way to resolve claims.”<sup>102</sup> Particularly because the initiative is sponsored by the same types of corporate lobbying groups that successfully urged the United States Supreme Court to legalize the use of forced arbitration clauses, the actual impacts of the initiative merit careful examination.<sup>103</sup>

<sup>102</sup> See Californians for Fair Pay and Accountability, [Home](#), last visited Feb. 2, 2024 (“California workers and businesses need a better way to resolve claims and labor code disputes without lengthy and costly lawsuits”).

<sup>103</sup> The California Chamber of Commerce, for example, is sponsoring the ballot initiative. See Californians for Fair Pay and Accountability, [Who We Are](#), last visited Feb. 2, 2024. Its national organization, the United States Chamber of Commerce filed

We conclude that the initiative would erode workers’ rights in three critical ways: (1) by serving as a **“bait-and-switch”** for the millions of California workers subject to forced arbitration; (2) by **eliminating PAGA** and the hundreds of millions of dollars it recovers annually to fund public workers’ rights enforcement; and (3) by **undermining the Labor Commissioner’s** most promising enforcement efforts, while creating new loopholes for lawbreaking employers.

### **A. The Ballot Initiative Is a “Bait-and-Switch” for the Millions of California Workers Subject to Forced Arbitration**

The ballot initiative’s backers point to expanding the Labor Commissioner’s individual wage claim adjudication process as “The Solution” for addressing wage theft.<sup>104</sup> **This promise amounts to a “bait-and-switch” for California workers, as employers have already used forced arbitration clauses to bar many workers from utilizing the wage claim adjudication process.**

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amicus briefs in *Epic Systems*, *Viking River*, and *Adolph*, first, to (successfully) deprive workers of their rights to file class actions, and then (unsuccessfully) to prevent workers with forced arbitration clauses from suing under PAGA. See A. Pincus, Counsel of Record, for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, Jun. 16, 2017, *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018); A. Parasharami, Counsel of Record, for the Chamber of Commerce of the United States of America as [Amicus Curiae](#) in Support of Respondent, Dec. 20, 2022, *Adolph v. Uber Technologies*, 14 Cal.5th 1104 (2023); A. Pincus, Counsel of Record, for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, Feb. 7, 2022, 5–6, *Viking River v. Moriana*, 142 S.Ct. 1906 (2022) (“Chamber Viking River Amicus”).

104 [Californians for Fair Pay and Accountability](#), video (“The Solution,” 2:21–2:45), last visited Feb. 2, 2024.

The United States and California Supreme Courts have ruled that workers’ right to participate in the wage claim process can be waived in a forced arbitration clause.<sup>105</sup> Although the ballot initiative purportedly preserves access to wage claims through a provision stating that “an arbitration agreement shall have no force or effect for any complaint filed with the Labor Commissioner,”<sup>106</sup> there is a risk this provision may be meaningless. When it comes to arbitration, federal law trumps state law, and the United States Supreme Court has repeatedly struck down state laws that seek to limit the reach of forced arbitration—often at the urging of the same types of industry groups backing the ballot initiative.<sup>107</sup>

If courts were to continue these trends and strike down this provision, the rest of the initiative might still take effect under the initiative’s severability clause.<sup>108</sup> If so, the initiative’s remaining provisions—repealing PAGA, hindering strategic enforcement, and

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105 See *supra* note 78.

106 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.1(b)).

107 See generally *AT&T Mobility LLC v. Concepcion*, *supra* note 78; *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); L. Coberly, Counsel of Record, for the Financial Services Roundtable in Support of Petitioner, Dec. 28, 2012, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); A. Kaplinsky, Counsel of Record, for the American Bankers Association in Support of Petitioner, Dec. 29, 2012, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); Brief of the Chamber of Commerce of the United States as *Amici Curiae* in Support of Petitioners, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013).

108 Ballot Measure Proposed Law, *supra* note 16, § 3.





committing the agency to answer every letter from an employer (as discussed *infra*)—would still remain in effect. Workers would face an enforcement landscape in which PAGA is eliminated, the Labor Commissioner is weakened, and the vast majority of workers are barred from participating in the initiative’s expanded wage claim adjudication process due to forced arbitration.<sup>109</sup>

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109 Some workers with arbitration clauses may be able to pursue wage claims following a lengthy delay during which the employer’s motion to compel arbitration is litigated in court. If the court determines the arbitration clause is unconscionable or otherwise unenforceable, the worker can proceed with a wage claim—but the initiative would have hardly delivered its promise of speedy resolution of complaints.

## **B. The Initiative Would Eliminate PAGA and the Labor & Workforce Development Fund (“LWDF”)**

The initiative’s passage would be the culmination of long-standing efforts by corporate and industry groups to eradicate PAGA.<sup>110</sup> PAGA’s demise would also weaken a range of PAGA-funded mechanisms that workers and the government can use to enforce workers’ rights.

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110 See generally *Hero Labor Law*, supra note 88, 12–13 (describing history of various employer-led attempts to repeal or weaken PAGA). Examples of such employer-led attempts include: Assem. Com. on Labor and Employment, [Bill Analysis](#) (2015–2016 Reg. Sess.) 13 (May 4, 2016) (listing the Civil Justice Association of California (“CJAC”) as supporting bill that would limit PAGA’s application to just four Labor Code provisions); Assem. Com. on Labor and Employment, [Bill Analysis](#) (2015–2016 Reg. Sess.) 12 (May 4, 2016) (listing CJAC as supporting bill that would provide employers with a right to cure any PAGA violation before a lawsuit is brought); Assem. Com. on Labor and Employment, [Bill Analysis](#) (2017–2018 Reg. Sess.) 3 (Jan. 10, 2018) (listing Chamber of Commerce as supporting bill that would expand employers’ right to cure under PAGA). CJAC has been described as a “Chamber of Commerce front group” (see [CAOC files Corporate Accountability Initiatives](#), Consumer Attorneys of California, 2024) and as “a front for multibillion-dollar multinational corporations (including Big Tobacco, the fossil fuel industry, and Wall Street banks) that seek to restrict consumers’ access to justice” (see J. Serna et al., [CAOC Prepares to Battle Initiatives on Attorney’s Fees, PAGA](#), Advocate Magazine (Dec. 2021)).



## Journalists Use PAGA To Fight Discrimination and Win Equal Pay

Bettina Boxall was a Pulitzer Prize-winning, Los Angeles Times reporter, who had uncovered numerous stories of wrongdoing since she first began working for the paper in 1987.<sup>111</sup> But according to Boxall, leading a lawsuit over discriminatory pay practices at the paper was “one of the proudest moments” in her career.<sup>112</sup>

The lawsuit, which was filed in October 2020 with Boxall as a lead plaintiff, alleged violations of California’s Equal Pay Act and PAGA.<sup>113</sup> The complaint stated that “despite the contributions of the entire newsroom to publish the daily paper, the Company’s bias in favor of white (non-Hispanic) and/or male employees has resulted in unlawful pay gaps in the four to five-figure range per year for many female and minority journalists.”<sup>114</sup> By joining together in a lawsuit to address the disparities in pay they had discovered, workers were able to win significant changes at the Times.

In September 2020, Angel Jennings, a co-plaintiff in the lawsuit, who was alleged to be “the only African American reporter in ... the paper’s largest news department,” was appointed to join the newsroom’s senior-most leadership team.<sup>115</sup> A few weeks later, in October 2020,<sup>116</sup> the newspaper owners and plaintiffs announced a \$3 million settlement, covering nearly 240 current and former reporters and editors.<sup>117</sup> “This puts the company on notice that women and people of color have to be valued—and paid—just as much as white men,” Boxall said.<sup>118</sup>

111 [Bettina Boxall and Julie Cart of the Los Angeles Times](#), *The Pulitzer Prize* (2024).

112 M. James, [Times, Tribune Settle Pay Disparity Suit](#), *Los Angeles Times*, e-Newspaper, last visited Feb. 2, 2024.

113 *Class, Representative, and Collective Action Complaint for Damages and Injunctive Relief*, *Boxall et al. v. Los Angeles Times* (Super. Ct. San Bernardino, 2020, Case No. CIV DS 2010984), filed Jun. 4, 2020, 3 (“Boxall Complaint”).

114 *Boxall Complaint*, *supra* note 113, 3. See also D. Folkenflik, [LA Times To Settle Suit Over Race and Gender Bias, As Editor Promises Change](#), *National Public Radio* (Jun. 25, 2020).

115 *Boxall Complaint*, *supra* note 113, 21; N. Pearlstine, [Angel Jennings named assistant managing editor for culture and talent at the Los Angeles Times](#) (Sept. 14, 2020).

116 *Boxall et al. v. Los Angeles Times* (Super. Ct. San Bernardino, 2020, Case No. CIV DS 2010984), [Revised Order re: Plaintiffs’ Motion for Preliminary and Conditional Approval of Class Action Settlement](#), filed Oct. 26, 2020, 17.

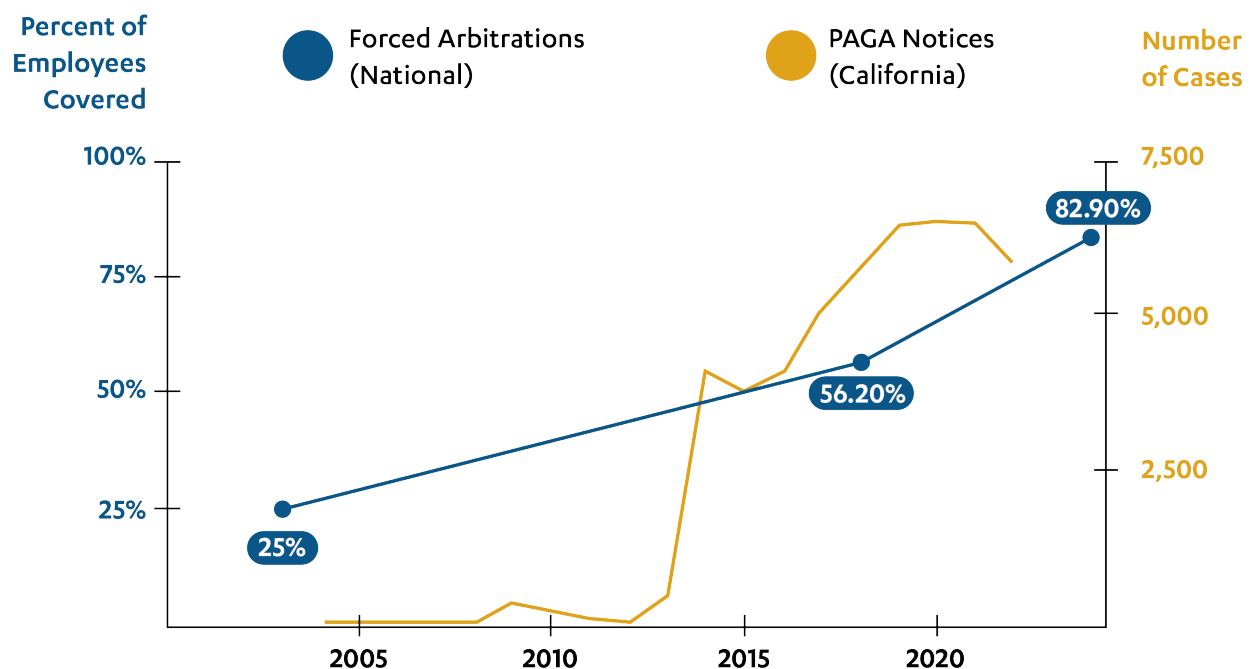
117 *Ibid*; M. James, *supra* note 112.

118 M. James, [Times, Tribune settle pay-disparity suit](#), *Los Angeles Times*, e-newspaper, last visited Feb. 2, 2024.

## 1. The ballot initiative would prevent workers with forced arbitration clauses from accessing the courts

Employer groups take issue with the rising number of PAGA claims.<sup>119</sup> In fact, the rise in PAGA filings has increased in direct proportion to the explosion in employer's use of forced arbitration clauses since the early 2000s (see Figure 2, *infra*), accelerated by the United States Supreme Court's 2018 *Epic Systems* decision, upholding the use of forced arbitration clauses prohibiting workers from joining class actions.<sup>120</sup> **Simply put, as workers were blocked from enforcing their rights through class actions, worker whistleblowers and their attorneys increasingly turned to PAGA as their only means to access the courts.**

Figure 2: Forced Arbitration Agreements and PAGA Notice Filings



<sup>119</sup> T. Manzo, *PAGA: A Double-Edged Sword for California Businesses*, The Orange County Register (Dec. 27, 2023).

<sup>120</sup> A. Colvin, *supra* note 75, 1 (finding that since the early 2000s, the share of workers subject to mandatory arbitration has doubled). PAGA case numbers obtained via State of California, Department of Industrial Relations, Private Attorneys General Act (PAGA) [Case Search](#), last visited, Feb. 2, 2024.

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## Having failed to convince “the most pro-business United States Supreme Court in a century” to eviscerate PAGA, corporations have now turned to the ballot.

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In 2022, corporate and industry groups, including the Chamber of Commerce and the California Business and Industrial Alliance, urged the United States Supreme Court to prohibit workers subject to forced arbitration clauses from taking PAGA cases to court.<sup>121</sup> With forced arbitration agreements estimated to cover 80% of non-union, private sector workplaces, blocking those workers from filing PAGA suits would leave only a small minority of workers able to use PAGA.<sup>122</sup> But the United States Supreme

Court remained unpersuaded, and, in the words of Justice Sotomayor’s concurrence, left it to California state courts to “have the last word.”<sup>123</sup>

Subsequently, the California Supreme Court unanimously upheld the rights of whistleblowers with forced arbitration clauses to pursue PAGA claims on behalf of their co-workers.<sup>124</sup>

Having failed to convince “the most pro-business United States Supreme Court in a century”<sup>125</sup> to eviscerate PAGA, corporations have now turned to the ballot. If their efforts are successful, they will effectively shut the courthouse door on the millions of California workers on whom they have imposed forced arbitration.

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121 A. Pincus, Counsel of Record, for the Chamber of Commerce of the United States of America as [Amicus Curiae](#) in Support of Petitioner, Feb. 7, 2022, 5–6, *Viking River v. Moriana*, 142 S.Ct. 1906 (2022) (“Chamber Viking River Amicus”); C. Boyden Gray, Counsel of Record, for the California Business and Industrial Alliance, as [Amicus Curiae](#) in Support of Petitioner, Feb. 7, 2022, 16–17, *Viking River v. Moriana*, 142 S.Ct. 1906 (2022); T. Goldstein, Counsel of Record, for the Retail Litigation Center as Amicus Curiae in Support of Petitioner, Feb. 7, 2022, 6–7, *Viking River v. Moriana*, 142 S.Ct. 1906 (2022); T. Scherwin, Counsel of Record, for the Restaurant Law Center as [Amicus Curiae](#) in Support of Petitioner, Feb. 7, 2022, 5–6; A. Mathieson, Counsel of Record for the California New Car Dealers Association as [Amicus Curiae](#) in Support of Petitioner, Feb. 7, 2022, 3; R. Rahm, Counsel of Record, for the California Employment Law Counsel as [Amicus Curiae](#) in Support of Petitioner, Feb. 7, 2022, 6, *Viking River v. Moriana*, 142 S.Ct. 1906 (2022); A. Metlitsky, Counsel of Record, for Employers Group, as [Amicus Curiae](#) in Support of Petitioner, Feb. 7, 2022, 6.

122 K. Hamaji et al., *supra* note 32, 1.

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123 *Viking River v. Moriana*, 142 S.Ct. 1906, 1925 (2022) (conc. opn. of Sotomayor, J.).

124 *Adolph v. Uber Technologies*, 14 Cal.5th 1104, 1114 (2023).

125 L. Epstein et al., [A Century of Business in the Supreme Court, 1920–2020](#), Abstract, 107 Minn. L. Rev. Headnote (2022), Virginia Public Law and Legal Theory Research Paper No. 2022-55, Virginia Law and Economics Research Paper No. 2022-16 (Feb. 26, 2023).

## Nurses Use PAGA To Fight for Safe Hospitals

In June 2021, a Sonoma County psychiatric hospital, operated by one of the nation's largest privately-held behavioral health hospital conglomerates, agreed to pay \$2.85 million to settle a PAGA lawsuit that alleged that understaffing and other labor issues had caused pervasive Cal/OSHA health and safety violations in the facility.<sup>126</sup>

The lawsuit was brought by Teresa Brooke, the facility's former director of nursing. In her complaint, Brooke alleged that she "arrived at the Hospital to find dangerous conditions unlike anything she had encountered in her 30 years of nursing."<sup>127</sup> Brooke alleged the "Hospital was plagued by a high incidence of injuries resulting from understaffing of the skilled nurses and other caregivers needed to care for high-needs patients."<sup>128</sup> According to Brooke, "unpaid and overworked staff ... faced repeated violent outbreaks among patients," and "the dearth of staff led to high incidence of patient self-harm and multiple occurrences of sexual violence."<sup>129</sup>

In what has been described as a "landmark settlement" involving health and safety violations

covering an entire facility litigated through PAGA, the settlement included sweeping measures to address the hospital's policies and practices.<sup>130</sup> In addition to \$682,250 for nurses and staff, and \$10,000 for Brooke's services as a whistleblower, the court-approved settlement included requirements that the hospital: hire a consultant to develop an Injury & Illness Prevention Program; regularly convene a patient safety committee, staffing committee, and quality council with non-management representatives from the Nursing Department; and hire an independent expert to evaluate the hospital's policies, practices, staffing models, budgets, structural layout, and wage rates.<sup>131</sup>

Plaintiff's counsel said they hope this PAGA settlement sets an example for "how psychiatric hospitals all over the state should protect the health and safety of these front-line health care workers."<sup>132</sup> While the settlement covered only PAGA penalties, it ultimately encouraged other employees to step forward. One worker at the facility, Nicole Chettero explained, "The Brooke case empowered me to step forward and bring light to other violations at Aurora Behavioral Health. When nurses and mental health staff don't receive lawful compensation, meal and rest breaks, they are forced to choose between caring for themselves, or the well-being and safety of their patients. No healthcare worker should ever have to face that dilemma."<sup>133</sup>

126 WorkCompAcademy.com, [Understaffed Psychiatric Hospital Resolves Suit for \\$2.85 Million](#), Daily News (Sept. 22, 2021) (describing Signature Healthcare Services, LLC, the hospital's operator, as "one of the largest privately-held behavioral health hospital conglomerates in the U.S."); *Brooke v. Aurora Behavioral Healthcare — Santa Rosa, LLC* (Supt. Ct. Sonoma, 2018, Case No. SCV 261926), [Complaint](#), filed Feb. 2, 201, 5–10 ("Brooke Complaint"); *Id.*, [Order and Judgment](#) Approving PAGA Settlement, filed Aug. 25, 2021 ("Brooke Settlement Order"); *Id.*, Notice of Private Attorney General Act Settlement And Release ("Brooke Settlement Notice").

127 Brooke Complaint, *supra* note 126, 2.

128 *Ibid.*

129 *Id.*, 2–3.

130 M. Espinoza, [Santa Rosa psychiatric hospital agrees to \\$2.85 million settlement over workplace conditions](#), The Press Democrat (Sept. 20, 2021).

131 *Id.*; Brooke Settlement Order, *supra* note 126, 3–4; Brooke Settlement Notice, *supra* note 126, 2.

132 M. Espinoza, *supra* note 130.

133 Statement on file with authors.

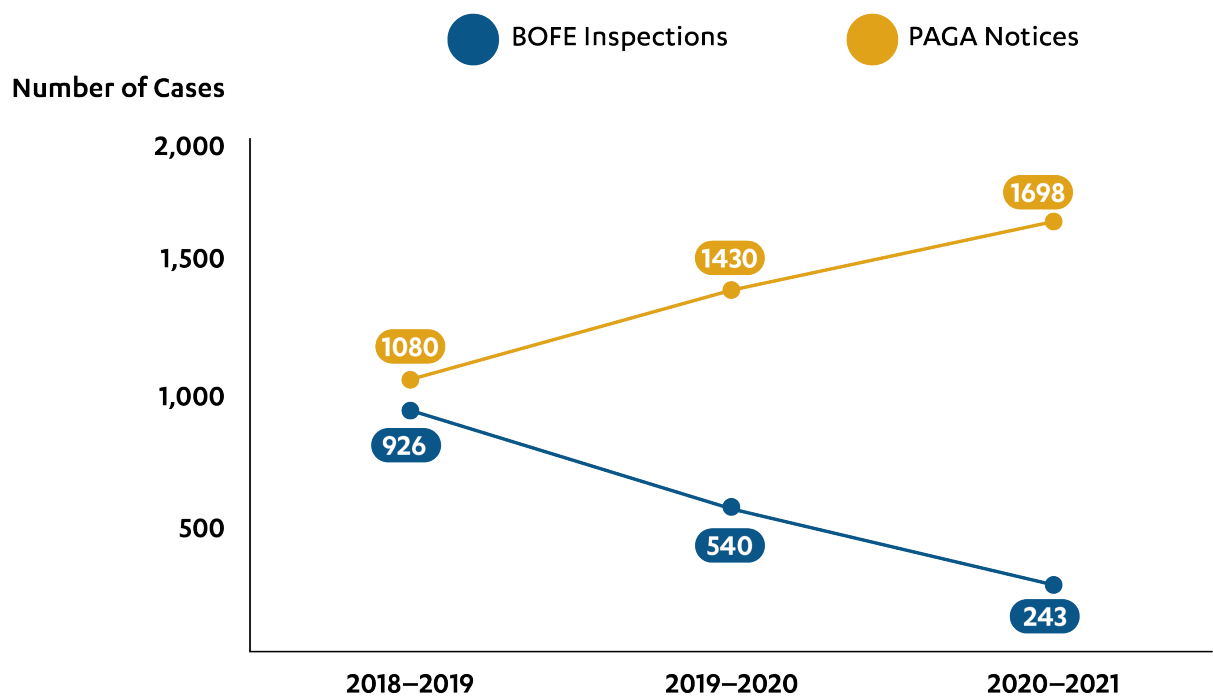


## 2. The ballot initiative would cut off workers' ability to enforce crucial rights at scale

Complaint-based wage claim systems are, on their own, insufficient to address wage theft. Individual wage claims do not reliably identify scofflaw employers in high-violation, low-complaint industries, because far too few workers file claims when they experience violations, and the most vulnerable workers in high-violation industries are particularly unlikely to file.

PAGA plays a crucial role in complementing BOFE's efforts to direct enforcement resources where they are needed most. **Newly available data shows that PAGA civil actions have had an outsized impact on securing key protections for workers in industries in which labor law violations have been the most rampant and challenging to combat.** Between October 2018 and September 2021, worker whistleblowers filed more than 4,208 PAGA notices with the LWDA in the following strategic, high-violation industries: agriculture, auto repair, car wash, garment, janitorial, restaurant, retail, and warehouse.<sup>134</sup> This is nearly three times the number of inspections BOFE conducted during the same period.<sup>135</sup>

Figure 3: BOFE Inspections Compared to PAGA Notices in High Violation Industries<sup>136</sup>



<sup>134</sup> Authors' analysis of data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023 in response to Public Records Act Request.

<sup>135</sup> DLSE attributes the fewer inspections in FY 2019–2020 and FY 2020–2021 to "challenges caused by the pandemic." 2020 BOFE Report, *supra* note 30, 10.

<sup>136</sup> Authors' analysis of data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023 in response to Public Records Act Request; California Labor Commissioner's Office, *2020-2021 The Bureau of Field Enforcement Fiscal Year Report*, 4 (2021).

One consequence of workers joining together to file PAGA lawsuits is that large systemic violators may be exposed to large civil penalties. In the words of Attorney General Rob Bonta, this “is as it should be.”<sup>137</sup> Google, Bank of America, Walmart, Rite Aid, Target, Virgin America, and McDonald’s are but a few of the large corporations that have paid multimillion-dollar judgments and settlements in cases alleging PAGA violations, including the largest PAGA-only settlement to date of \$27 million in December 2023.<sup>138</sup>

137 Cal. AG Viking River Amicus, *supra* note 91, 18.

138 Joint Stipulation for Settlement of Representative Action under Labor Code Private Attorneys General Act, [Exhibits 1 and 2](#) to Declaration of Kevin. J. McNerney in Support of Motion for Dismissal, *Green v. Bank of America*, Case No. 2:11-cv-04571-PA-AGR, ECF No. 85 (C.D. Cal. Nov. 4, 2016) (noting creation of \$15 million settlement fund in *Garrett v. Bank of America, et al.* (Super. Ct. Alameda County, 2016, RG 13699027); [Final Approval Order, Nucci v. Rite Aid](#), Case No. 3:19-cv-01434-LB, ECF No. 136 (N.D. Cal. May. 26, 2022) (approving gross settlement amount of \$12 million of wage and hour class action for failure to reimburse for uniforms brought under PAGA); J. Mundy, [Retail Giant Target Settles California Labor Lawsuits Over Cashier Seating for \\$9 Million](#), [LawyersandSettlements.com](#), Aug. 16, 2018 (describing \$9 million settlement for three lawsuits alleging Target failed to provide cashiers with seats during their shifts in violation of PAGA, i.e., *Murphy et al. v. Target Corp. et al.*, Case No. 3:09-cv-01436 (S.D. Cal.), *Thompson et al. v. Target Corp.*, Case No. 2:16-cv-00839 (C.D. Cal.), *Enombang v. Target Corp.*, Case No. RG 17853948 (Alameda Cty. Super. Ct. Jul. 24, 2018)); [Order and Final Judgment Approving Settlement Between Class Plaintiffs and Wal-Mart Stores](#) in *Brown et al. v. Walmart, Inc. et al.*, Case No. 5:09-cv-03339-EJD, ECF No. 302 (N.D. Cal. Mar. 28, 2019) (approving gross settlement amount of \$65 million in suitable seating case brought under PAGA); J. Steingart, [Walmart Deal to Pay \\$65M for Cashier Seating Approved](#), [Bloomberg Law](#) (Dec. 7, 2018) (describing same); [Order Granting Plaintiffs’ Unopposed Motion](#) to Approve the Plan of Allocation, Attorney’s Fees and Expenses, and Service Awards to Class Representatives, *Bernstein v. Virgin America, Inc.*, Case No. 15-cv-02277-JST, ECF No. 487 (N.D. Cal. Nov. 3, 2023) (noting entry of amended

The threat of significant civil penalties is necessary for PAGA to create a market incentive to comply with labor laws. Because corporations are accountable to shareholders, they are incentivized to invest in compliance when noncompliance presents a significant risk to their profits.<sup>139</sup> **For noncompliance to threaten profits, the enforcement ecosystem must create a substantial likelihood that violations will both be discovered and punished with meaningful penalties, which PAGA does.**<sup>140</sup> Governments face resource constraints in prosecuting and litigating violations, especially against deep-pocketed corporations. By harnessing the capacity of private attorneys—who select strong cases because they only get paid if they prevail—PAGA helps California hold corporate giants to account.<sup>141</sup>

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judgment of nearly \$31 million); Order Granting Motion for Final Approval of Class Action Settlement and Judgment in *Ochoa, et al. v. McDonald’s Corp., et al.*, No. 3:14-cv-02098-JD, ECF No. 391 (N.D. Cal. Aug. 4, 2017) (finalizing approval of \$3.75 million settlement agreement in wage and hour case brought under PAGA); October 26, 2016, Settlement Agreement, Exhibit A to Declaration of Barbara J. Chisholm in support of Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement with McDonald’s Defendants, in *Ochoa, et al. v. McDonald’s Corp., et al.*, No. 3:14-cv-02098-JD, ECF No. 381-2 (N.D. Cal. Oct. 28, 2016); Order Granting Plaintiffs’ Motion for Approval of PAGA Settlement and Motion for Attorneys’ Fees, Costs, and Service Awards in *John Doe et al. v. Google et al.*, Case No. CGC-16-556034 (S.F. Super. Ct. Dec. 4, 2023); Comments of LWDA Regarding Proposed PAGA Settlement, 2:9–10 in *John Doe et al. v. Google et al.*, Case No. CGC-16-556034 (S.F. Super. Ct. Nov. 30, 2023).

139 See *supra* note 17 and accompanying text.

140 *Ibid.*

141 Freeman Engstrom, *supra* note 18, 1289–90 (empirical analysis of over 4,000 qui tam suits showing that private attorneys are better at screening meritorious cases and that their expertise minimizes enforcement costs).



### **PAGA Ensures Workers Realize the Promise of California’s Paid Sick Leave Law**

In February 2023, the California Court of Appeal ruled that workers are now permitted to use PAGA to directly enforce the state’s paid sick leave law.<sup>142</sup> Previously, federal courts had ruled that only the government—and not workers—can vindicate workers’ rights to use and be adequately compensated for their earned sick leave. In making its determination, the Court of Appeal explained that “it seems inconceivable that the Legislature intended to prohibit PAGA actions to enforce the Act,” since “[d]oing so would essentially leave *only* the Labor Commissioner and the Attorney General to litigate violations—and the Legislature had already determined a

decade earlier that these agencies were flatly incapable of adequately enforcing labor laws.”<sup>143</sup> The Court equated the employer’s argument that only the government could enforce California’s paid sick leave law as transforming the law into “nothing more than statutory cotton candy—something that looks nice but has no substance.”<sup>144</sup> As a result of PAGA, California employers now face the real possibility of being held accountable for paid sick leave violations through significant civil penalties. Through PAGA, what employers once thought was a “cotton candy” right has now been given substance.

<sup>142</sup> *Wood v. Kaiser Foundation Hospitals*, 88 Cal. App.5th 742 (2023).

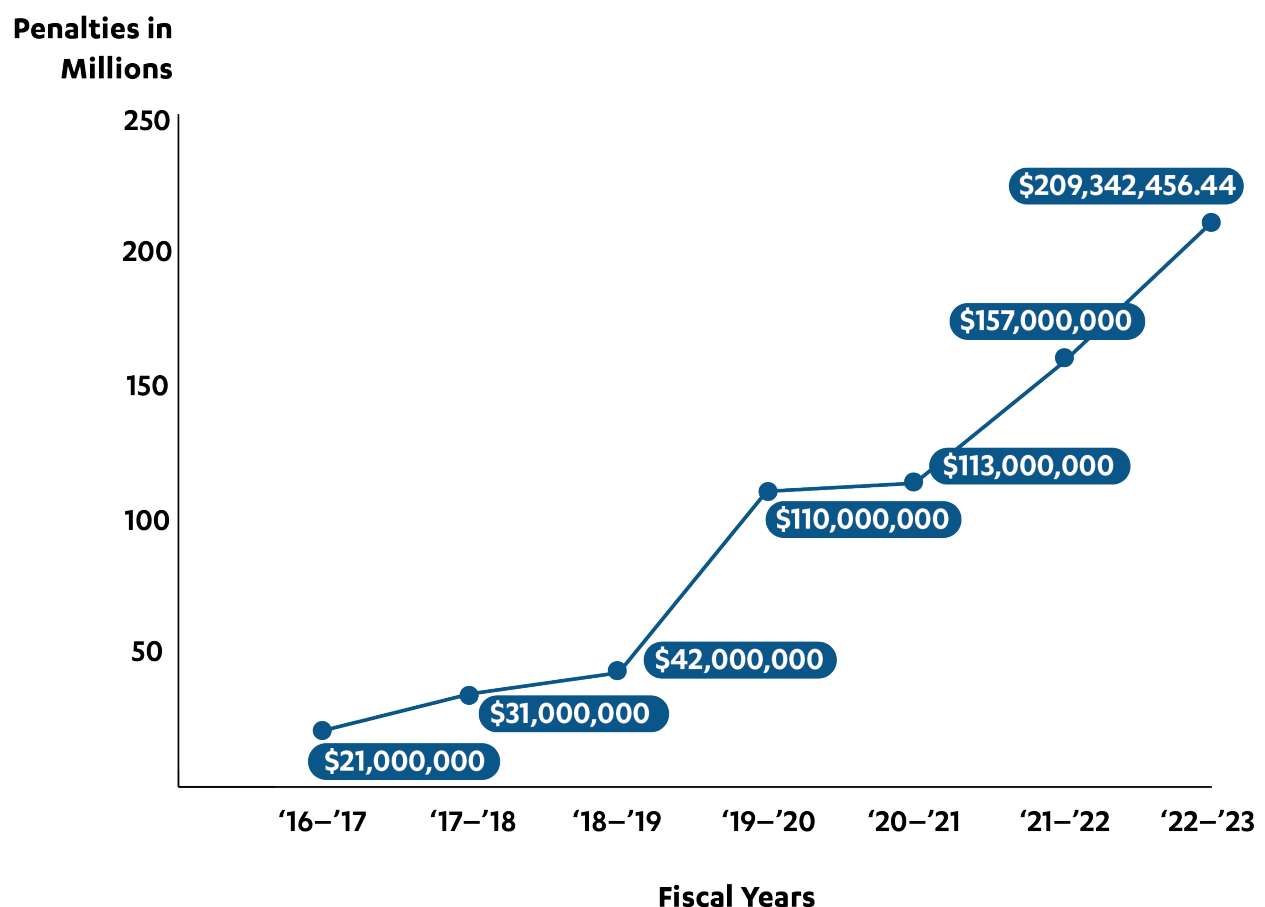
<sup>143</sup> *Id.* at 759.

<sup>144</sup> *Ibid.*

### 3. By eliminating PAGA, the initiative takes away the significant revenues generated by it, which have strengthened California's labor enforcement efforts

Newly available data shows that PAGA has transferred significant sums from lawbreaking employers to the state, which are reinvested to enhance labor education and compliance efforts.<sup>145</sup> Last fiscal year, the LWDA recovered over \$209 million in civil penalties and filing fees through PAGA.<sup>146</sup>

Figure 4: Amount of Civil Penalties Collected from PAGA (2016 to 2022)<sup>147</sup>



<sup>145</sup> See Cal. Lab. Code, § 2699(j); Cal. AG *Viking River Amicus*, *supra* note 91, 16.

<sup>146</sup> Data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023 in response to Public Records Act Request.

<sup>147</sup> *Ibid.*



PAGA has served as a steady revenue source for enhancing the capacity of public labor law enforcement, weathering the ups and downs of a shifting economic climate.<sup>148</sup> If PAGA were eliminated, workers and the public would lose the benefits of this funding. In recent years, efforts funded in whole or part by PAGA have included programs augmenting the internal capacity of enforcement agencies—by bolstering staffing and investigative resources—as well as programs extending the reach of those agencies, by supporting community-based outreach and education. Recent, PAGA-funded programs include:

- Enhancing agency staffing to implement and enforce protections for the rehiring and retention of workers displaced by the COVID-19 pandemic;<sup>149</sup>
- Improving legal coordination between the LWDA's departments (e.g., Labor Commissioner, Cal/OSHA, Employment Development Department);<sup>150</sup>
- Supporting strategic enforcement on publicly funded residential construction;<sup>151</sup>
- Launching a first-of-its-kind Domestic Worker Outreach and Education Program by collaborating with community

organizations to provide education, outreach, and training to domestic workers and employers;<sup>152</sup>

- Starting a Workers Rights Enforcement Grant Program which funds local city attorneys and district attorneys to combat wage theft and protect state revenue;<sup>153</sup> and
- Creating a statewide California Workplace Outreach Program, in which, during the pandemic, community organizations conducted live, person-to-person outreach to nearly 2 million Californians in 42 languages, and helped create over 200 customizable culturally, linguistically, and literacy-appropriate outreach materials.<sup>154</sup>

**By creating a positive feedback loop in which civil penalties paid by violators bolster labor law enforcement, PAGA serves as a self-funded, “win-win-win” policy for workers, the government, and the public.** Workers win when PAGA vindicates their rights. The government wins when its capacity to enforce the law is enhanced. And the public wins when fair competition is protected, fostering a level playing field for economic growth.

148 The bulk of California's taxes come from personal income taxes, which tend to fluctuate with the stock market. See J. Osborn D'Agostino et al., [California's budget whiplash: From a record-setting surplus to a massive shortfall in one year](#), Cal Matters Explainer (Jun. 12, 2023).

149 [Sen. Bill No. 93](#) (2021–2022 Reg. Sess.), § 2.

150 Labor & Workforce Development Agency, [Fiscal Year 2021-2022 Budget Change Proposal](#), Budget Request Name 0559-003-BCP-2021-GB, 1 (Nov. 13, 2020).

151 [Assem. Bill. No. 175](#) (2021–2022 Reg. Sess.), § 11.

152 [Sen. Bill No. 101](#) (2022–2023 Reg. Sess.), 7350-101-3078, Provision 3.

153 *Id.*, 7350-101-3078(3)1.

154 California Coalition for Worker Power, [Worker Power Coalition Celebrates State Budget Investments in Transformation Outreach & Workers Rights Enforcement](#), last visited Feb. 2, 2024. [Sen. Bill No. 101](#) (2022–2023 Reg. Sess.), 7350-101-3078, Provision 2.

## A First-of-Its-Kind PAGA-Funded Program with Domestic Workers at the Center

California's Domestic Worker and Employer Outreach Program ("DWEOP") is a statewide, PAGA-funded program that serves as a model for expanding the reach of labor agencies through outreach and worker empowerment by community-based organizations.<sup>155</sup>

By training workers to participate in enforcement, DWEOP develops the skills and leadership of domestic workers to uplift violations in their industry. With an emphasis on peer-to-peer outreach, "[d]uring the initial implementation phase of 27 months, the program held nearly 400 trainings for over 10,600 workers, communicated with over 165,000 domestic workers, and provided one-on-one legal consultations to over 800 workers that have resulted in the recovery of about \$275,000 in stolen wages" back into the hands of workers. "The [program] also reached nearly 45,000 domestic employers and trained over 1,100 of them in fair employment practices."<sup>156</sup>

Due to its success in enhancing worker voice in one of the most precarious of industries, in July 2023, the state allocated \$35 million from the PAGA Fund to expand and make the DWEOP pilot program permanent.<sup>157</sup>

<sup>155</sup> [Sen. Bill No. 101](#) (2022–2023 Reg. Sess.), 7350-101-3078, Provision 3. See generally, Cal. Labor Code, § 1455.

<sup>156</sup> *Power in partnership*, *supra* note 57, 39–40.

<sup>157</sup> [Sen. Bill No. 101](#) (2022–2023 Reg. Sess.), 7350-101-3078, Schedule 2, Provision 3 ("For local assistance, Department of Industrial Relations, payable from the Labor and Workforce Development Fund" and allocating

## 4. Employers' claims in support of eliminating PAGA lack empirical support

According to its proponents, the ballot initiative would address serious problems with California's enforcement system. We therefore examine employer contentions about PAGA, which employers have criticized for clogging the courts with meritless claims and failing workers.<sup>158</sup> We find no empirical support for these assertions.

In a report we published in 2020, data disputed employers' assertion that PAGA suits are filed for "alleged technical error[s]."<sup>159</sup> Updated

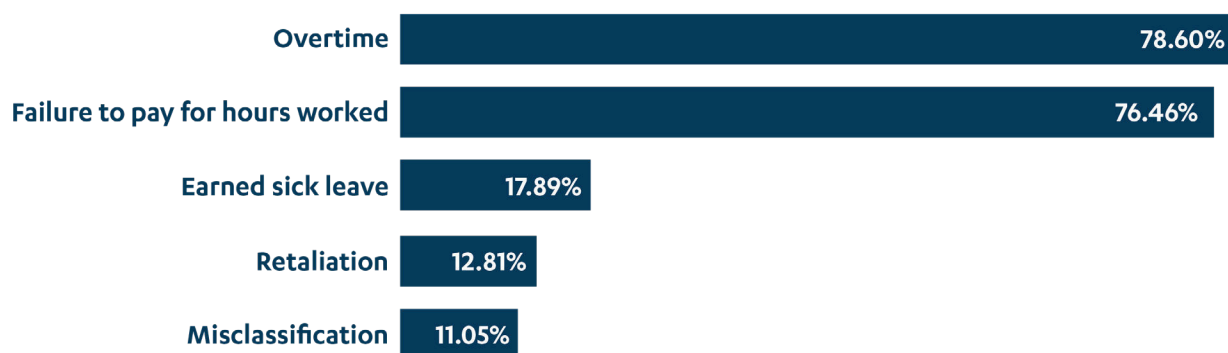
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<sup>158</sup> T. Manzo, [The Private Attorneys General Act is devastating the Golden State](#), Orange County Register (Jun. 3, 2023); J. Barrera, [Why California's well-intentioned PAGA labor law needs reform](#), Orange County Register (Feb. 8, 2023).

<sup>159</sup> *Hero Labor Law*, *supra* note 88, 10–11. [Californians for Fair Pay and Accountability](#), video (:18–:29), last visited Feb. 2, 2024. It is not clear what Labor Code violations initiative proponents consider "technical errors." Most provisions of California's Labor Code are enforceable through PAGA; PAGA claims can be brought for fraudulent misclassification of employees as independent contractors, violations of child labor laws, and failure to provide meal and rest breaks, among others. However, with limited exceptions, PAGA actions cannot be brought for "for any violation of a posting, notice, agency reporting, or filing requirement." (Cal. Lab. Code, § 2699(g)(2).) In 2016, the Legislature passed AB 1506, amending PAGA to allow employers to "cure" what the bill's author termed "technical violations of the itemized wage statement requirements. These examples include: (1) placing the company logo on the wage statement rather than spelling out the name of the employer; (2) failing to include items like 'LLC,' 'LP,' or 'Inc.' after the name of the employer; and (3) listing the last date of the pay period, but not the beginning date of the pay period (even though the employees are paid every two weeks)." See Sen. Rules Com., Off. of Sen. Floor Analyses, [3d reading](#) analysis of Assem. Bill No.

data continue to show that PAGA suits address violations that have a serious impact on workers’ well-being.<sup>160</sup> More than nine out of ten (91%) PAGA claims allege wage theft, including overtime violations (79%) and failure to pay for all hours worked (76%).<sup>161</sup> A smaller but still significant share involves violations of earned sick leave rights (18%), fraudulent misclassification of employees as independent contractors (11%), and retaliation (13%).<sup>162</sup>

**Figure 5: Types of Violations in PAGA Notices<sup>163</sup>**



Historically, PAGA’s opponents have expressed concern with government efficiency, claiming that PAGA suits have inundated state courts.<sup>164</sup> Data show these concerns are ill-founded. **Updated data show PAGA suits, while critically important to labor standards enforcement, comprise less than 1% of state court cases.**<sup>165</sup> This finding is consistent with prior research showing that qui

1506 (2015–2016 Reg. Sess.) 6 (Sept. 1, 2015). These technical violations only give rise to a PAGA suit if the employer fails to timely remediate the violations. (Cal. Lab. Code, § 2699.3(c)(2)(A).)

160 For data from September 2016 to January 2020, see *Hero Labor Law*, *supra* note 88, 10–11.

161 Authors’ analysis of data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023 in response to Public Records Act Request. For purposes of this analysis, the authors considered the following violation categories to be “wage theft”: failure to pay minimum wage, failure to pay overtime, failure to pay for all hours worked, failure to pay wages upon termination, other unpaid wages, and tip violations.

162 *Ibid.*

163 *Ibid.*

164 Sen. Judiciary Com., [Analysis](#) of Sen. Bill No. 796 (2003–2004 Reg. Sess.), 7 (Apr. 30, 2003) (claiming, in arguments in opposition to PAGA, that the law “clog[s] already overburdened courts” with “meritless claims”).

165 In fiscal year 2022–23, **732,788 civil cases** were filed in California’s courts; of those, only **6,543** — or **0.89%** of the total — were PAGA cases. See Authors’ analysis of data provided by Hina B. Shah, California Labor & Workforce Development Agency, to Francisco Diez of the Center for Popular Democracy by email, July 24, 2023 in response to Public Records Act Request; authors’ analysis of

tam whistleblower<sup>166</sup> enforcement schemes like PAGA filter meritorious claims cost-effectively and efficiently.<sup>167</sup> Indeed, the nonpartisan Legislative Analyst Office predicts that, if the ballot initiative succeeds in repealing PAGA, the burden on California's court system could actually increase because "trial courts could receive an increased number of appeals from the Labor Commissioner decisions or other civil filings that would otherwise have been pursued [collectively] as [PAGA] lawsuits."<sup>168</sup>

PAGA's critics point to some PAGA cases with small individual settlements and awards for workers, asserting that PAGA fails to prioritize workers' monetary recovery.<sup>169</sup> As crafted by the Legislature, PAGA entitles workers to 25% of the penalties awarded but does not provide a means to recover back pay. Employers argue that expanded, individualized wage claim adjudications offer better results.<sup>170</sup> This argument fails for two reasons. First, forced arbitration clauses can block workers from proceeding with

their wage claims. Second, workers struggle to recover payment even when they win a wage claim. In 2019, workers who filed wage claims collected less than 20%—or only \$40 million of the roughly \$320 million—of the unpaid wages they claimed they were owed.<sup>171</sup> Even court-issued judgments can ring hollow. According to Labor Commissioner data, only one in seven employers who were issued court judgments in wage claim cases in 2017 had paid their workers five years later.<sup>172</sup> Recovering back wages for workers is critical but challenging no matter the venue. **Detering** violations—which is what PAGA does—is paramount.

An enforcement scheme that relies solely on investigating individual complaints would be a disaster for California's workers. **The scale of enforcement required in the industries with the most rampant wage and hour violations is vast.** Collectively, these industries employ over 3 million—or nearly 1 in 5—of all California workers.

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data provided by Mark Woo-Sam, California LWDA, by email, December 10, 2018, to Michael Rubin of Altschuler Berzon in response to Public Records Act request; Judicial Council of California, *2024 Court Statistics Report: Statewide Caseload Trends*, 3 (2024).

166 Qui tam actions refers to a type of legal action in which private citizens may sue on behalf of the government and share in the recovery of funds. See K. Hamaji et al., *supra* note 32, 15.

167 D. Freeman Engstrom, *supra* note 18, 1289–90.

168 Legislative Analyst and Dir. of Finance, *Fiscal Impact Analysis Letter* re: AG File No. 21-0027, Amendment No. 1 to Attorney General Rob Bonta, 3–4 (Nov. 23, 2021)

169 J. Barrera, *supra* note 158.

170 Californians for Fair Pay and Accountability, *Home*, last visited Feb. 2, 2024.

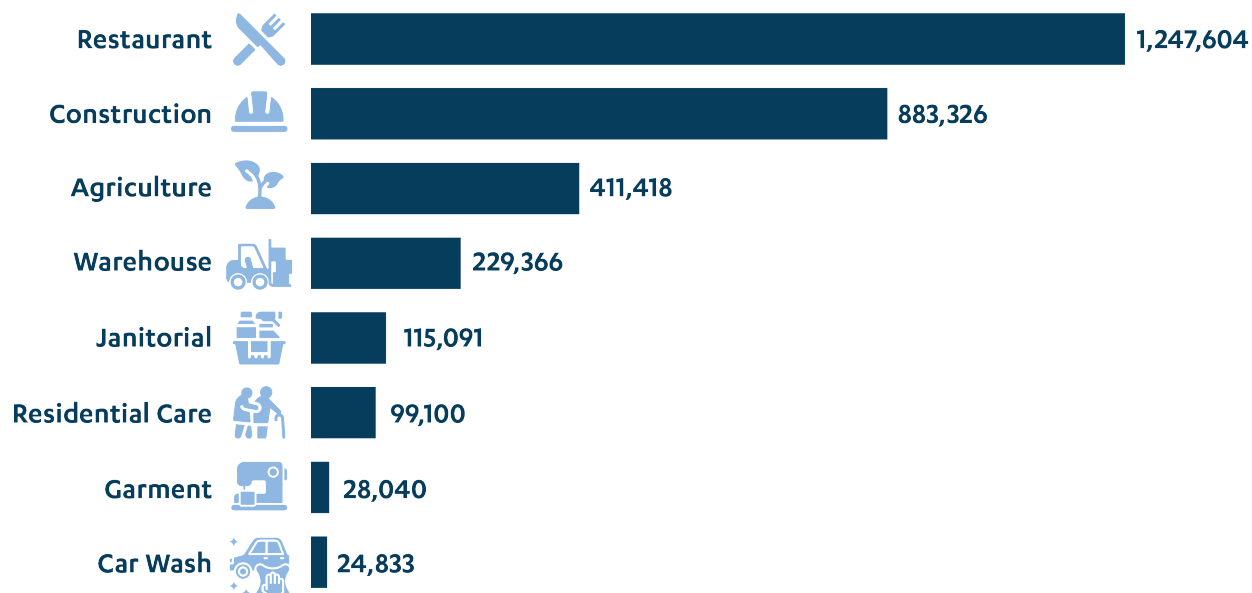
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171 2020 LAO Unpaid Wage Claim Report, *supra* note 28.

172 J. Kuang et al., *Wage theft whack-a-mole*, Cal Matters (Sept. 15, 2022).



Figure 6: By the Numbers: California Industries Targeted for Wage Theft Enforcement<sup>173</sup>



Against this backdrop, it is perhaps not surprising then, that **the approximately \$40 million recovered by workers in administrative adjudications with the Labor Commissioner each year represent approximately 2% of the \$2 billion per year it is estimated that California workers lose to wage theft.**<sup>174</sup> PAGA is an irreplaceable tool for preserving workers’ access to the courts and ability to collectively deter wage theft. As a farmworker in a recently filed PAGA suit explained, “The more workers we are, the more they listen to us. That’s why we’re doing this action together. Let’s stop being afraid and start finding our voice.”<sup>175</sup>

<sup>173</sup> Analysis of BLS Quarterly Census of Employment and Wages (2021) using Employment and Wages Data Viewer and Occupational Employment and Wage Statistics by State and Industry for: agriculture, forestry, fishing and hunting (NAICS 11), car washes (NAICS 811192), construction (NAICS 23), apparel manufacturing (NAICS 315), janitorial services (NAICS 561720), food services and drinking places (NAICS 722), warehousing and storage (NAICS 493); Data USA, [Residential Care Facilities, Except Skilled Nursing Facilities](#), California workforce data (99.1k), Deloitte & Datawheel, last visited Feb. 2, 2024.

<sup>174</sup> 2020 LAO Unpaid Wage Claim Report, *supra* note 28; D. Cooper et al., *supra* note 29, 10.

<sup>175</sup> Press Release, [Farmworkers Who Picked Driscoll’s Strawberries in Oxnard File Suit Alleging Stolen Wages](#), Mixteco Indigena Community Organizing Project (Apr. 17, 2023).

## California's Largest PAGA Settlement to Date: A Tech Industry Turning Point

On December 4, 2023, a judge approved a \$27 million settlement paid by Google in what the LWDA described as “the largest PAGA-only settlement, and second largest civil recovery penalty, in a PAGA action to date.”<sup>176</sup> The lawsuit by former and current Google employees alleged that Google and its staffing agency had imposed confidentiality agreements and policies that unlawfully restricted workers’ rights to communicate about wages and workplace issues.<sup>177</sup> Workers alleged that Google had prohibited employees from speaking plainly about illegal conduct or dangerous product defects, prohibited them from disclosing their Google salary to a prospective employer, and prohibited them from speaking to the government, attorneys, or press about wrongdoing at Google.<sup>178</sup>

The settlement, which covers nearly 100,000 Google workers, is an example of how plaintiffs can use PAGA to prioritize changes in working conditions. As the LWDA noted, “this settlement

has achieved significant labor law enforcement in inducing Google to change its policies which allegedly violated fundamental rights of employees ... and including a notice to employees of their rights under the allegedly violated statutes. To our knowledge, this is the first PAGA case which has obtained remedies of this nature.”<sup>179</sup>

Journalist Reed Albergotti described the case as one that “sparked employee activism in tech,” which in turn, “helped spark a major turning point in the industry,” as tech workers became increasingly vocal about issues like sexual harassment.<sup>180</sup> As plaintiffs highlighted in their complaint, “a publicly-traded company with Google’s reach, power, and close ties to the federal government cannot be permitted to declare to its workforce that everything it does and everything that happens—from the location of a water cooler to serious violations of the law—is ‘confidential’ upon pain of termination and the threat of ruinous litigation.”<sup>181</sup> Protecting whistleblowers protects us all.

176 [Comments of LWDA](#) Regarding Proposed Settlement, *John Doe et al. v. Google, Inc. et al.* (Super. Ct. San Francisco, 2016, Case No. CGC-16-556034), filed Nov. 30, 2023, 2 (“LWDA Settlement Comments”).

177 *Id.*, [Complaint](#) Pursuant to the Private Attorneys General Act, *John Doe et al. v. Google, Inc. et al.* (Super. Ct. San Francisco, 2016, Case No. CGC-16-556034), filed Dec. 20, 2016, 1–2 (“Doe Complaint”).

178 *Ibid.*

179 LWDA Settlement Comments, *supra* note 176, 3.

180 R. Albergotti, [Google reaches \\$27 million settlement in case that sparked employee activism in tech](#), *Semafor* (Dec. 1, 2023).

181 *Doe Complaint*, *supra* note 177, 2.

## C. The Initiative Will Substantially Weaken the Enforcement Capacity of the Labor Commissioner

The initiative extends far beyond PAGA to enact a sweeping array of provisions that would interfere with the Labor Commissioner's capacity to enforce the law. Although this aspect of the ballot initiative has received less public attention, its negative impact would be no less devastating for California's workers.

### 1. The ballot initiative would restrict the Labor Commissioner from using proven enforcement strategies

Researchers have lauded the Labor Commissioner's community enforcement efforts as "one of the greatest success stories."<sup>182</sup> **The initiative would undermine the expansion and implementation of this successful approach** by eliminating the agency's authority to contract with non-governmental entities or attorneys "to pursue any claim or legal action against an employer."<sup>183</sup> The ballot initiative would also limit the Labor Commissioner's capacity to contract with outside counsel to add litigation capacity under the close supervision of agency staff.

Such a restraint contradicts recommended practices of using public funds to tap the expertise of non-governmental organizations to cost-effectively extend the agency's reach.<sup>184</sup> For example, the state's nonpartisan Legislative Analyst Office recently recommended that the state reimburse legal aid nonprofits and community groups that assist with wage claim adjudications, as a way to improve the process.<sup>185</sup>

The ballot initiative would further erode the Labor Commissioner's community enforcement capacity by discouraging information sharing between the agency and the public during investigations.<sup>186</sup>

Evidence is hard to gather without information sharing and investigative leads referred by community-based organizations.<sup>187</sup>

Community-based organizations are uniquely positioned to gather witnesses, testimony, and information that workers would not otherwise share with government investigators.<sup>188</sup> The ballot initiative would make it more difficult for the government to secure cooperating witnesses, weakening enforcement.

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182 J. Fine et al., *Strategic Enforcement*, *supra* note 56.

183 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.6). Community enforcement efforts that center on outreach would be unaffected since they do not involve "any claim or legal action against an employer." (*Id.*) However, other types of partnerships could be impaired. See generally *Power in Partnership*, *supra* note 57, 16–21 (describing different forms of community enforcement).

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184 *Power in Partnership*, *supra* note 57, 4.

185 2020 LAO Unpaid Wage Claim Report, *supra* note 28.

186 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.6 (prohibiting division from "disclos[ing] information obtained by a division investigation to any member of the public until the investigation has concluded and a decision has been made by the division about whether to issue a citation")).

187 C. Dejillas et al., *The Labor Standards Enforcement Toolbox: Sharing Information With Community Organizations*, CLASP & Rutgers Center for Innovation in Worker Organization, 10 (Sept. 2019).

188 *Power in Partnership*, *supra* note 57, 28–29.

## BOFE Case Sends Ripples through High-Violation Industry

On December 6, 2023 the Labor Commissioner announced a settlement in the state's largest-ever residential care facility wage theft case, in which more than 140 caregivers for the elderly were awarded \$5.5 million.<sup>189</sup> This historic victory was made possible through a collaboration between the Pilipino Workers Center, a non-profit, community organization that first reported the violations in 2017, and the Labor Commissioner.<sup>190</sup>

The staff allegedly worked 24-hour shifts, six days a week, caring for people with Alzheimer's and dementia, as well as bedridden hospice patients and others in wheelchairs, while earning as little as \$2.40 an hour and being paid no overtime.<sup>191</sup>

One former employee, Sinagtala Limbo, reportedly told investigators, "I slept there, ate there, and at times management physically prevented me from leaving the facility. It took a lot of courage for us to speak up and initiate the investigation, but I am glad we did."<sup>192</sup>

The case was widely covered in mainstream and industry publications, sending a message to employers and workers facing similar violations.<sup>193</sup> Yvonne Medrano, a legal aid attorney who represented the workers said, "We hope this sends a loud and clear message to residential care home employers. Pay your workers. If you don't, we will go after you and we will fight vigorously to make sure that workers get money back in their pockets."<sup>194</sup>

189 S. Flay, *More than 140 caregivers for elderly awarded \$5.5 million after being paid \$2 an hour*, Eyewitness News ABC 7 (Dec. 7, 2023).

190 Dept. of Industrial Relations, *California Labor Commissioner's Office Reaches \$5.5 Million Wage Theft Lawsuit Settlement to Compensate 148 Caregivers* (News Release no: 2023-87) (Dec. 6, 2023).

191 K. Smith, *148 elder-care workers getting more than \$8.3 million in wage theft case*, Los Angeles Daily News (Oct. 20, 2021).

192 *Id.*

193 *Id.*; N. Perez, *Care Workers Awarded \$5.5 million in wage theft dispute against Adat Shalom in West Hills*, LAist (Dec. 6, 2023); *\$8.5 Million in Citations Issued to Owner of 6 California Residential Care Facilities Upheld*, Insurance Journal (Oct. 20, 2021); M. Roosevelt, *Southern California assisted living chain cited for paying workers below \$3 an hour*, The Orange County Register (Jan. 9, 2018); L. Bowers, *California operator cited \$7 million for alleged labor law violations*, McKnights Senior Living (Jan. 10, 2018); J. Cutler, *L.A. Elder-Care Operator Owes \$8.5 Million in Wage Penalties*, Bloomberg Law (Oct. 20, 2021).

194 N. Perez, *supra* note 193.



## 2. The ballot initiative would weaken the Labor Commissioner by diverting agency resources into costly programs unlikely to advance enforcement

The ballot initiative would further weaken the Labor Commissioner’s strategic enforcement capacity by **diverting agency resources into ineffective programs that undermine enforcement and would likely increase state costs by upwards of \$100 million per year.**<sup>195</sup>

**First, the initiative would redirect the agency’s scarce resources into painstakingly addressing hypothetical situations rather than taking action in real cases,** by requiring the Labor Commissioner to issue advice letters within three months of an employer requesting information on how to comply with a law or regulation.<sup>196</sup> David Weil, the former Wage and Hour Administrator under the Obama administration, has described such letters—which can be issued without an investigation and in which workers have no ability to tell their side of the story—as a “capricious tool for settling complicated regulatory questions.”<sup>197</sup>

**Second, the initiative would dramatically weaken employer incentives for compliance by creating “free pass” programs that allow employers to, in the words of the initiative,**

**“correct” identified labor law violations “without penalty.”**<sup>198</sup> Employers have lobbied for these kinds of loopholes, like “notice and cure” provisions, for over twenty years without success.<sup>199</sup> As workers’ rights organizations have highlighted, these kinds of programs “erode existing disincentives for violating workers rights” and “let[] guilty employers off the hook.”<sup>200</sup>

Specifically, this initiative would force the Labor Commissioner to respond to employer requests for confidential consultations on potential labor violations.<sup>201</sup> The consultation provision favors employers because it does not require the agency to investigate, and does not give workers the right to provide evidence that may support a violation.<sup>202</sup> Intensifying the veil of secrecy, the initiative requires that the agency’s findings “be recorded in a confidential written report.”<sup>203</sup> The possibility of erroneous agency determinations seems high, given the

195 Ballot Measure Title and Summary, *supra* note 35 (noting “[l]ikely increase in state costs to enforce labor laws that could exceed \$100 million per year”); Ballot Measure Proposed Law, *supra* note 16.

196 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.4(d)).

197 N. Scheiber, *Labor Dept. Says Workers at a Gig Company Are Contractors*, The New York Times (Apr. 29, 2019).

198 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.4(c)).

199 See, e.g., *Assem. Bill No. 227* (2009–2010 Reg. Sess.) (proposing the creation of a “Labor Standards Consultation Unit” which may not cite an employer if “corrective action” is taken) (“A.B. 227 Report”); *Sen. Bill. 1363* (2001–2002 Reg. Sess.) (same).

200 *Id.*, 5; see generally Sen. Com. on Labor and Indus. Relations, *Bill Analysis* on Sen. Bill No. 1363 (2001–2002 Reg. Sess.), 1 (May 14, 2002) (opponents claiming that “that this measure permits an employer, whether acting in good faith or not, to avoid accountability for labor violations through the guise of seeking consultation with the state”).

201 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.4(c)(1)).

202 *Ibid.*

203 *Ibid.*

lack of external review by workers and the public, paired with the likely large number of requests. If the Labor Commissioner finds a violation, employers are given a 60-day “free pass” to “correct” the violation penalty free, without specifying what it means to “correct” a violation.<sup>204</sup> This both invites employers to argue that a mere change from an unlawful to a lawful policy—without paying workers the wage they are owed—constitutes a “correction.”<sup>205</sup> It also undermines any employer incentive to comply with the law in the first place.<sup>206</sup>

Significantly, the initiative’s “free pass” program also discourages one of the most cost-effective compliance strategies—informal resolution of complaints. Workers and their advocates often recover back wages without any government involvement through “informal processes such as demand letters explaining the company’s legal obligations.”<sup>207</sup> This allows the government to focus on more recalcitrant employers. Yet employers are unlikely to voluntarily correct violations in response to an informal demand if they can instead rely on a “free pass.”

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204 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.4(c)).

205 See generally A.B. 227 Report, *supra* note 199, 5 (citing off-the-clock policy as an example of the ambiguity of what it means to take a “corrective action”).

206 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.4(c)(2)).

207 *Power in Partnership*, *supra* note 57, 13.

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**Significantly, the initiative’s “free pass” program also discourages one of the most cost-effective compliance strategies—informal resolution of complaints.**

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**Third, the initiative would mandate that a large amount of state resources be channeled into having the Labor Commissioner appear as a party in every single individual wage claim adjudication (or “Berman” hearing)—**which currently number approximately 30,000 per year.<sup>208</sup> In a state with over 1 million employers and more than 15 million workers, the Labor Commissioner is already showing the strain of the mammoth task of fighting wage theft.<sup>209</sup> Forcing the Labor Commissioner to double the resources devoted to individual wage claims—providing a factfinder to assess evidence, and appearing as a party to represent the state’s interest—is unlikely to move the needle on compliance.<sup>210</sup>

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208 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, §§ 90.5(c), 2699.1); see also 2020 LAO Unpaid Wage Claim Report, *supra* note 28 (30,000 wage claims per year).

209 California State Auditor, [2023-104 Audit Scope and Objectives](#) (Mar. 22, 2023) (describing audit to provide independently developed and verified information related to the backlog of wage theft cases at the California Labor Commissioner’s Office); California Employment Development Department, [Table: California Firms and Employment by Size Range 2022 Q4](#).

210 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.1(a)). See also D. Weil, *supra* note 62, 11–16; D. Galvin et al., [Data Brief: A Roadmap for Strategic Enforcement](#), Center for Innovation in Worker Organization, 2, (Sept. 2020) (noting research suggesting that “the traditional, complaint-based model of labor standards enforcement is ineffective for many workers who are most vulnerable to violations”).



The individual wage claim process should be resourced sufficiently to timely resolve workers' complaints. But doubling down on the number of agency staff assigned to each hearing will not achieve that goal. And timely resolution of complaints is insufficient to compel employers to adhere to the law going forward.

Whether the Labor Commissioner can undertake these onerous new obligations without undermining its core worker-facing functions is an open question. The initiative purports to require the Legislature to “ensure that all necessary funding is provided ... to fully meet the division’s mandates under the Labor Code.”<sup>211</sup> Grim budget forecasts make this unlikely.<sup>212</sup> Whether—and under what circumstances—the Legislature can be compelled to provide this funding, and how its amount would be determined, remain open questions. But even if substantial investments are made, it could take years for the agency to scale up by hiring and training hundreds of new staff. More fundamentally, there will never be sufficient public funding to replace the enormous investigative capacity that PAGA plaintiffs provide the state at no cost to taxpayers.

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211 Ballot Measure Proposed Law, *supra* note 16 (proposed Cal. Lab. Code, § 2699.2).

212 The state is projected to have a multibillion dollar budget hole annually through 2027–2028. M. Zinshteyn, [Legislature’s analyst gives mixed review of Newsom budget](#), Cal. Matters (Jan. 13, 2024).





### III. Conclusion

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In an age of increasing corporate concentration and rapidly growing economic inequality, California has led the way in uplifting workers' rights and in enacting policies to implement and enforce those rights. Data show that all three pillars of California's enforcement regime for workers outside of collective bargaining—enforcement by the Labor Commissioner, private enforcement by workers through individual and class action lawsuits, and PAGA actions—are crucial and interdependent.

Two of the state's most successful labor enforcement policies—PAGA and community-centered, strategic enforcement—are endangered by a ballot initiative that would outright eliminate the former and seriously weaken the latter. These policies have played “a particularly important role in ensuring the fair and equal treatment of some of the state's most vulnerable workers,” and secured some of the largest enforcement victories in the state's history.<sup>213</sup> Indeed, the very effectiveness of these policies may have triggered this well-funded corporate backlash.

Proponents of the ballot initiative observe that “workers deserve better,” and they do.<sup>214</sup> California's workers deserve policies that would actually strengthen tools for enforcing their rights, including expanding resources for strategic enforcement, deepening community-enforcement partnerships, reinvesting PAGA penalties into innovative outreach and education programs, improving PAGA's ability to drive employer investments in compliance, and improving collections of back wages from recalcitrant employers. It is also critical to enhance the Labor Commissioner's capacity to timely and effectively enforce our state's labor laws—through BOFE, the wage claim adjudication process, judgment enforcement, and retaliation investigations—by addressing the root causes of the agency's staffing crisis. The ballot initiative accomplishes none of these goals. Instead, for all too many of our state's workers, it only widens the gap between reality and justice.

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213 Cal. AG Viking River Press Release, *supra* note 94; 2020 BOFE Report, *supra* note 30, 3.

214 Fix PAGA Ad, paid for by “Fix PAGA: A Better, Fairer Way for Workers. A Project of Californians for Fair Pay and Employer Accountability” (accessed Jan. 13, 2024).



# Glossary

**Berman Hearing or Wage Claim Adjudication:** Informal, administrative hearing procedure with the Division of Labor Standards Enforcement (“DLSE”) to resolve wage disputes between a worker and their employer.<sup>215</sup>

**Bureau of Field Enforcement (“BOFE”):** Entity within the DLSE that is responsible for the investigation and enforcement of various California Labor Code statutes as well as group claims involving minimum wage and overtime claims. BOFE does not pursue individual claims for wages.<sup>216</sup>

**Class Action:** A procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or “class.”<sup>217</sup>

**Community Enforcement:** Programs in which nongovernmental organizations, typically worker or community-based organizations (CBOs), have an institutionalized relationship with a government enforcement agency and play a role in governmental enforcement programs.<sup>218</sup>

**Department of Industrial Relations:** State department that administers and enforces laws governing wages, hours and breaks, overtime, retaliation, workplace safety and health, apprentice training program and medical care and other benefits for injured workers. DLSE, Cal/OSHA, and the Division of Workers’ Compensation are among the divisions and departments housed within the DIR.<sup>219</sup>

**Division of Labor Standards Enforcement (“DLSE”):** Also referred to as the **Labor Commissioner’s Office**, it is a division within DIR responsible for: adjudicating wage claims, investigating retaliation complaints, and enforcing the wage and hour and other protections within California’s Industrial Welfare Commission Wage Orders and the Labor Code, among others.<sup>220</sup>

**Forced Arbitration:** When a company requires a worker, as a condition of taking a job, to waive their right to sue in court, instead mandating that disputes must be resolved by a private arbitrator.<sup>221</sup>

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215 D. Cheng, [Wage Claim Procedures and DLSE Berman Hearings](#) (CA), Practical Guidance, Lexis-Nexis, last visited Feb. 2, 2024.

216 Department of Industrial Relations, [Overview of Bureau of Field Enforcement](#) (Rev. 2/2013).

217 Cornell Law School, [Class Action](#), Legal Information Institute, last visited Feb. 2, 2024.

218 *Power in Partnership*, *supra* note 57, 6.

219 Department of Industrial Relations, [About Us](#), last updated Apr. 2023.

220 Thomson Reuters, California Division of Labor Standards Enforcement ([Glossary](#)), last visited Feb. 2, 2024.

221 K. Hamaji et al., *supra* note 32, 1.

**Labor & Workforce Development Agency (“LWDA”):** State agency responsible for overseeing seven major departments, boards and panels that serve California workers including: the DIR, the Employment Development Department, the Agricultural Labor Relations Board, the Employment Training Panel, the Public Employment Relations Board, the Unemployment Insurance Appeals Board, and the Workforce Development Board.<sup>222</sup>

**Labor and Workforce Development Fund (“LWDF”):** Also referred to as the “PAGA Fund,” a state fund which is funded primarily from Private Attorneys General Act (“PAGA”) lawsuit settlement proceeds. Its funds are set aside for labor law enforcement and education.<sup>223</sup>

**Strategic Enforcement:** Enforce strategy in which government enforcement agencies prioritize and direct their efforts to where problems are the largest, workers are the least likely to exercise their legal rights, and where the agency can impact industry-wide compliance.<sup>224</sup>

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222 Labor & Workforce Development Agency, [About the Labor and Workforce Development Agency](#) (2024).

223 Legislative Analyst’s Office, [The 2020–21 Spending Plan: Labor and Employment Issues](#), Budget and Policy Post (Oct. 5, 2020).

224 T. Goldman, [The Labor Standards Enforcement Toolbox: Introduction to Strategic Enforcement](#), Rutgers Center for Innovation in Worker Organization, 2 (Aug. 2018).

# Acknowledgments

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