California Tinkers with its “Sue Your Boss” Law

On January 1 of this year, California’s “Labor Code Private Attorney General Act of 2004” (the “LCPAGA”) came into effect. Christened by the press as the “Sue Your Boss Law” and the “Bounty Hunter Statute,” the LCPAGA created penalties for literally every provision of California’s labor laws and combined the procedural aspects of *qui tam* (false claims) statutes and California’s notoriously expansive Unfair Competition Law (California Business & Professions Code § 17200) into an amalgam that guarantees class-action-like litigation for years to come.

As a result of this summer’s political stalemate in Sacramento over the state budget, on August 11, 2004, California’s governor signed SB 1809—a package of reforms to the LCPAGA—into law. SB 1809 was passed as an emergency measure and went into effect immediately. It has turned the LCPAGA into an even more complex statute, restricting liability in some respects and making liability harder to assess, and more costly to manage, in others.

The Original Act

The LCPAGA, California Labor Code § 2699, gives individual aggrieved employees a private right of action to enforce wage-hour laws that formerly carried only a penalty enforceable by the state. It functions in part like the Unfair Competition Law (permitting employees to sue on behalf of all similarly aggrieved employees without necessity of class certification), and in part like a *qui tam* statute (permitting the employee to retain a bounty of 25 percent of the penalty). It also gives individual aggrieved employees the right of action to collect such penalties on behalf of all other aggrieved employees of up to $200 per pay period per employee (for violations beyond the initial violation) for those Labor Code sections that previously carried no explicit penalty provisions. An initial amendment took workers’-compensation-related provisions outside of scope of the Act, but the rest of the 9,060 sections of the California Labor Code remain subject to the provisions of the LCPAGA.

The Amendments

SB 1809 makes the following major changes to the LCPAGA:

- It abolishes civil penalties “for any violation of a posting, notice, agency reporting, or filing requirement of the [Labor] Code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.”
- It requires court review and approval of any 2699 settlement.
- For a wide variety of Labor Code violations, it institutes a “right of first refusal” notice procedure where plaintiffs must notify the California Labor and Workforce Development Agency (the “LWDA”), and the employer, of the alleged violation beforehand, and cannot commence an action if the agency cites the employer. Only if the agency takes no action can the employee go forward with the suit.
- For CalOSHA violations, a modified version of this procedure requires the employee to go to court if the Department of Occupational Safety and Health declines to cite the employer, in order to reverse the determination. In addition, SB 1809 allows the employer to cure the violation if no investigation occurs.
- It imposes a “cure” period for certain less frequently cited provisions of the Labor Code, allowing an employer to come into compliance by itself.
- It establishes a new cause of action for retaliation for asserting a claim under the LCPAGA.
- It allows courts to exercise the same discretion as the LWDA does when assessing penalties.
Lingering Questions (and Few Answers) About the LCPAGA

Unfortunately for those hoping that the reform of the LCPAGA would result in a significantly curtailed statute, those hopes were mostly frustrated. The main thrust of the LCPAGA—to give private rights of action where only the state agency could act before, and to create penalties for hundreds of Labor Code sections that previously had none—was hardly affected by the new law. Aside from eliminating LCPAGA penalties for posting violations, other changes either continue to leave the open issues open or, even worse, open new issues. Here are a few of the most significant questions left unanswered:

The 2004 Act Does Not Resolve, but Significantly Clarifies, the Retroactivity Question. As soon as the LCPAGA went into effect this year, employers began amending existing class action complaints to include LCPAGA claims to collect penalties for alleged violations that took place prior to the effective dates of the statute. Employers immediately challenged the retroactive application of the LCPAGA to mixed results before trial courts. The inclusion of an express retroactivity provision applicable to some (but not all) provisions of SB 1809 significantly strengthens the employers’ arguments.

In Evangelitos v. Superior Court, the California Supreme Court held that various statutes, including Civil Code § 3, C.C.P. § 3 and Labor Code § 4, “reflect[] the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted ‘unless express language or clear and unavoidable implication negatives the presumption.’” In Myers v. Philip Morris Co., Inc., it stated that “the presumption that legislation operates prospectively rather than retroactively is rooted in constitutional principles.” A variety of formulations have been cited by the California courts to express the rule that the Legislature’s intent must be “so clear, strong and imperative” before the courts resort to the unusual step of applying a new statute retroactively.

The 2003 Act contained no reference to the retroactive application of the statute, which strongly suggests that it was not retroactive. Its legislative history indicates that retroactive application of the statute was considered and rejected, because the original definition of “aggrieved employee” in the Act once contained the qualification that an “aggrieved employee” was anyone “covered by the applicable statute of limitations.” This latter phrase was removed from the Act before passage, suggesting that the LCPAGA was not intended to reach violations occurring before 2004, but which would otherwise fall within the statute of limitations of the underlying Labor Code provision.

SB 1809 lends further support to this argument. It explicitly makes two of the changes contained in SB 1809 (the provision making the LCPAGA inapplicable to posting rules, and the requirement of judicial approval of settlements) retroactive to January 1, the original effective date of the Act. Thus, SB 1809 will be relied upon by employers to point out that if the Legislature had wanted to make the original Act’s provisions retroactive, it knew exactly how to do so.

The LWDA’s New “Right of First Refusal” Provides Little Comfort to Employers. The “right of first refusal” provisions of SB 1809, codified at Labor Code §§ 2699.3(a) and 2699.5, require an employee to inform the LWDA about the “specific provisions” alleged to have been violated, “including the facts and theories to support the alleged violation.” It also sets deadlines for the Agency to announce it will conduct an investigation (33 days), and issue a citation (158 total days). If the Agency either declines to investigate, or investigates and determines that no citation is appropriate, the employee is free to proceed with a lawsuit. There is no election of remedies and no allowance for the state agency to impose its own judgment or receive any deference as to whether any bona fide violations have occurred. In fact, if the agency misses the statute’s five-day deadline for “timely” communicating a decision, the employee can arguably go ahead with his or her action.

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1 44 Cal.3d 1188, 1206 (1988).
2 Id. at 1207-08 (quoting Glavinich v. Commonwealth Land Title Ins. Co., 163 Cal.App.3d 263, 272 [1984].
3 28 Cal.4th 828, 839 (2002)
4 Id. at 844 (2002) (“only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.”); Evangelitos v. Superior Court, 44 Cal.3d 1188, 1206-07 (1988) (“the unequivocal and inflexible import of the terms, and the manifest intention of the legislature”); Yoshioka v. Superior Court, 58 Cal. App. 4th 972, 980 (1997) (“the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied”) (quoting U.S. Fidelity Co. v. Struthers Wells Co., 209 U.S. 306, 314 [1908]).
The "right of first refusal" provisions apply to a specified list of approximately 160 of the most significant provisions of the Labor Code. These Labor Code provisions include most of the wage payment "means and manner" provisions in Labor Code Section 200, et seq.; the leave sections of the Labor Code; the wage/working condition disclosure provisions; the gratuity provisions; the bond deposit provision; the polygraph provision; the general unlawful terms and conditions in writing provision; the arrest disclosure provision (although apparently not the two-year marijuana conviction provision); the audio or video recording of an employee restroom provision; the compelled purchase provision; the daily overtime and alternative work week provisions; the one-day's-rest-in-seven provisions; the railroad and other industry-specific maximum hours on duty provisions; the anti-"yellow dog" contract provisions; the employee solicitation fraud provisions; the unlicensed contractor provisions; the drug and alcohol rehabilitation program provisions; the political activities of employees provisions; the prohibition of anti-whistle-blowing policies provision; the agricultural employer unfair labor practices statute; the DLSE information and access provisions; the minimum wage/overtime civil action authorization provisions; the equal expense and indemnification of employees provisions; the benefits discontinuation notification provisions; the knowing undercapitalized contractor provisions; the garnishment anti-retaliation provisions; the recruitment/apprenticeship discrimination provision; the CalOSHA anti-retaliation provisions; and the material safety datasheet request provisions.

The only comfort an employer can take from these provisions is that (1) it has an opportunity to negotiate a lower penalty from the LWDA, and thus preclude the employee's lawsuit, since "any appropriate citation" apparently will preclude the action, and (2) the employer will receive early notice of the lawsuit. Since the penalties provided in the LCPAGA are frequently cumulative to other remedies available to an employee, negotiation with the LWDA may often be pointless, especially since an employee does not appear to be precluded from litigating the appropriateness of the LWDA's citation. More importantly, none of the penalties that are subject to the LWDA's "right of first refusal" are subject to the new cure provisions of the LCPAGA. Thus, for a wide range of Labor Code provisions, LCPAGA merely slows down the process of liability determination rather than effectively mitigating the scope or amount of overall penalties to any degree.

The New Cure Provision is of Minor Scope and Raises More Questions than it Answers. The LCPAGA still requires notice to the LWDA (and the employer) about "specific provisions" alleged to be violated, "including the facts and theories to support the alleged violation," even for more minor violations not found on the list of violations specified in new Labor Code § 2699.5. However, instead of being subject to the LWDA's "right of first refusal," the LCPAGA gives the employer a 30-day period to cure. Cal. Lab. Code § 2599.3(c).

The problem with the new cure provisions, however, is that the definition of "cure" in the new amendments is ambiguous enough to generate further litigation. SB 1809 defines "cure" to mean that "the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole." While the first part of this definition is straightforward (the violations are "cured" if the employer "abates" each one), the remaining parts raise further problems.

For instance, the requirement that the employer come into "compliance with the underlying statutes as specified in the notice" suggests that a valid "cure" include a demonstration of wider compliance with the law than the "specific" violations enumerated in the notice. Not only does this require the employer to prove a negative (the absence of violations), there are no clear criteria for determining how much wider the compliance must be. Which statutes are the ones "underlying" the "specific provisions" identified in the employee's notice? It seems likely that further litigation will be needed.

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5 These Labor Code provisions include most of the wage payment "means and manner" provisions in Labor Code Section 200, et seq.; the leave sections of the Labor Code; the wage/working condition disclosure provisions; the gratuity provisions; the bond deposit provision; the polygraph provision; the general unlawful terms and conditions in writing provision; the arrest disclosure provision (although apparently not the two-year marijuana conviction provision); the audio or video recording of an employee restroom provision; the compelled purchase provision; the daily overtime and alternative work week provisions; the one-day's-rest-in-seven provisions; the railroad and other industry-specific maximum hours on duty provisions; the anti-"yellow dog" contract provisions; the employee solicitation fraud provisions; the unlicensed contractor provisions; the drug and alcohol rehabilitation program provisions; the political activities of employees provisions; the prohibition of anti-whistle-blowing policies provision; the agricultural employer unfair labor practices statute; the DLSE information and access provisions; the minimum wage/overtime civil action authorization provisions; the equal wage provisions; the basic minimum wage and overtime provisions in Labor Code §§ 1197 and § 1198; the anti-retaliation maximum hours provision; the misdemeanor/fine equal wage provision; the employment of minors provisions; the farm labor contractor license provision; various farm labor provisions; the artists' trust fund and talent agency provisions; the advance-fee talent services provisions; the prevailing rate provisions (and associated payroll records provisions); the public works working hours and overtime provisions; the industrial handwork prohibited materials provision; the garment manufacturing records, minimum wage, and overtime compensation provisions; provisions for sheepherders; the employer expense and indemnification of employees provisions; the benefits discontinuation notification provisions; the knowing undercapitalized contractor provisions; the garnishment anti-retaliation provisions; the recruitment/apprenticeship discrimination provision; the CalOSHA anti-retaliation provisions; and the material safety datasheet request provisions.

6 There is a second, even more complex, notice procedure codified at California Labor Code § 2699.3(b) for CalOSHA provisions (other than those not in § 2699.5). Under it, an employee is precluded from proceeding with a § 2699.3(b) action if the Division of Occupational Safety and Health issues a citation. The employee may challenge a decision not to issue a citation in the Superior Court, transforming that court into a court of occupational safety and health review. If the Division does not investigate suitably, the employer then has a chance to "cure" the alleged violation. However, it is unclear what happens if the Division does investigate the violation and makes a determination that no CalOSHA violation occurred and the court upholds the Division's decision. Presumably, that would end the action.
to clarify this question.

But the requirement that all aggrieved employees be “made whole” is the most troublesome. The concept of making an employee “whole” usually revolves around some monetary loss suffered by the employee that is recompensed. Since one of the core underlying purposes of the LCPAGA is to create a right to a penalty recovery for employees where beforehand there was none, it is only natural that employees and some courts will make payment of the specified LCPAGA penalty the touchstone of making employees “whole.” However, this would result in the paradox of the employer who in good faith cures the alleged violation to suffer the same measure of penalty over the same amount of time as an employer who did not. (Although, of course, an employer who unsuccessfully litigates will incur additional interest and penalties while the matter is being litigated.) It may be that the “cure” simply turns out to be the exact same “disease” of penalty violation damages, instead of any real mitigation (or incentive) at all. Because of the limited scope of the cure provisions, however, in reality, it may be many years before this issue is decided by a court.

One Violation, Two Violation, Three Violation, More? A further troubling aspect of the original Act that the amendments did not address is the definition of “violation.” The LCPAGA provides for penalties for “a violation of” the Labor Code. Cal. Lab. Code §§ 2699(a) & (f). A key question is, how are these violations individuated and how, if at all, do they cumulate with each other? For example, take Labor Code § 212(a)(1), one of the major violations not subject to cure. It prohibits issuing wage payments in any form of check or instrument “unless it is negotiable and payable in cash, on demand, without discount, at some established place of business in the state, the name and address of which must appear on the instrument and at the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer has sufficient funds in or credit” for the payment. This one subsection poses at least nine and arguably more requirements on an employer. What happens if an employer violates more than one of those subcomponent requirements? For a continuing violation, this could mean the difference between $200 per pay period per employee and $1,800 per pay period per employee. Unfortunately, the LCPAGA provides no guidance on this issue.

Further Information

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