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PERSPECTIVE

State Supreme Court has a chance to rein in PAGA abuse

By Kimberly Stone

California has been a hotbed for highly speculative employment litigation, which is threatening the very jobs the lawsuits say they are trying to protect. For many companies, when the cost of employment litigation abuse is subtracted from the bottom line, they may not be able to hire new workers, may be forced to leave the state, or may not set up shop here in the first place. The impact is being felt across the state's economy, from retailers to manufacturers.

Whether employment litigation abuse in California will get better or worse over the next decade is right now in the hands of our state Supreme Court. The lower courts in both cases rejected the lawsuits as being unsupported by the law. These lawsuits were also not helpful for providing workplace protections. Litigation in these cases did not provide the right answer.

In the first case, *Williams v. Superior Court*, S227228, an employee filed a representative wage and hour action against Marshalls department store under California's Private Attorneys General Act (PAGA). To support his case, he filed a discovery motion seeking the private personnel files for 16,000 Marshalls employees. The Supreme Court is considering whether he can have access to all these files before showing that even his own claim is valid.

If the court allows the plaintiff access to all of these files, PAGA will become even more ripe for abuse than it already is. PAGA, often called "Sue Your Boss," is a whistleblower statute enacted in 2004 to encourage employees to sue when there are wage and hour violations. An employee files an enforcement action, not just for him or herself, but also for the state and other employees. The employee can keep up to 25 percent of any award. There have been many PAGA cases over minor or technical pay stub violations, even when the employee was fully compensated.

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As the lower court explained, the state Legislature tried to put in safeguards in PAGA so that workers do not have a perverse incentive to file frivolous claims. It required the whistleblower to first prove that he or she had sustained damages caused by an actual violation before filing a PAGA action to represent others. It also allows courts to phase in discovery, so that access to others' records is done in a controlled way and does not violate the privacy rights.

Otherwise, PAGA could be invoked by employees to go on invasive and expensive fishing expeditions, often over minor or technical violations. Rather than just resolve the problem if there actually is one, companies would be pressured to settle claims, even when not merited, in order to protect other employees' privacy rights and save the high costs of litigation.

The second case before the California Supreme Court is *Solus Industrial Innovations v. Superior Court*, S222314. An Orange County attorney sought to create his own enforcement action against a California employer independent of the regulatory regime that state and federal officials have in place for this purpose. Here, the lower court rejected the county's action, finding that more enforcement is not always better enforcement.

As the lower court held, federal and state agencies already take workplace safety laws extremely seriously. They have a long history of working together on an enforcement system that prioritizes compliance with workplace safety laws and uniform enforcement. By law, the U.S. Occupational Safety and Health Administration must give approval to any state plan to change these rules, which includes increasing fines for violations. California is one of a few states with such a federally approved plan.

In this case, the county attorney freelanced on his own, invoking laws having nothing to do with workplace safety. Such actions may get headlines, but as the lower court appreciated, the harsh penalties the county attorney tried to impose were at odds with the state's focus on fair and consistent enforcement, adoption of strong safety programs, and quick remediation of violations.

The common thread in both of these cases is making sure that California has laws that create the right incentives. If the goal is to ensure that Californians have compliant places to work, the state Supreme Court should make sure that private individuals have credible claims before seeking to file statewide enforcement actions and county attorneys cannot interfere with federal and state regulators. The right answer is not more litigation.

National business groups are watching, with the National Association of Manufacturers and other groups filing friend-of-the-court briefs in these cases. The state already has laws that seek the proper balance between employer accountability and excessive litigation. Our state Supreme Court should defer to these laws and rein in litigation abuse.

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