

## **Legislative Update: Labor Code Private Attorneys General Act**

By Christopher W. Olmsted, Attorney

Recent legislation signed into law by Gray Davis in his waning days as governor will radically increase the risk of employee lawsuits.

The law will be known as "The Labor Code Private Attorneys General Act of 2004" and it will be found in Section 2698 of the California Labor Code.

The law places the power of the government into the hands of individual employees. Under existing law, government agencies such as the Department of Industrial Relations have the power to assess and collect penalties for violations of the Labor Code.

Proponents of the bill, known as Senate Bill 796, argued that the state agencies are under-funded and understaffed. As a result, the Labor Code has not been effectively enforced to the detriment of California employees. The solution was to provide aggrieved employees with the power to file civil actions to collect penalties that state agencies could collect if they had the resources.

According to the legislative analyst, opponents contended that the bill "tipped the balance of labor law protections in disproportionate favor to the employee to the detriment of already overburdened employers." The fear has been expressed that hordes of bounty-hunting plaintiffs' attorneys will descend upon California employers like locusts, filing lawsuits over petty or technical violations.

### **Details of the New Law**

An "aggrieved employee" may file a lawsuit to collect a civil penalty from his or her employer who has violated the Labor Code. An aggrieved employee is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."

The prevailing employee keeps only 25% of the recovered penalty. The other 75% goes to the state's General Fund and the California Labor and Workforce Development Agency.

Most fines found in the Labor Code are in the range of a few hundred dollars per violation. While over time the penalties can accumulate significantly, this liability alone is not the real reason for concern. Of more concern to employers are three provisions. First, successful employee litigants can recover attorney's fees. While there may be little or no incentive to file a lawsuit to collect the fine alone, the attorney's fees provision is a powerful lure for plaintiffs' lawyers. Second, another provision expressly permits aggrieved employees to bring an action on behalf of other current or former employees. In essence the law contemplates class actions. One employee claim seeking a minor penalty may be a nuisance; a large group of past and present employees seeking penalties could devastate a business.

The third provision is equally troubling. Those familiar with the Labor Code may think: "At least I only have to worry about the sections containing penalty provisions." Not so. The new law *creates* a penalty for each Labor Code section that does not already contain one. Generally, the penalty will be \$100 per aggrieved employee per pay period for the initial violation, and \$200 per employee per pay period for each subsequent violation.

There are some limitations. First, the employee must have been "aggrieved." Arguably this means that the employer's Labor Code violation must have adversely affected the particular employee's rights under the Code. Presumably then, a "no harm, no foul" defense should exist: "Yes, regrettably we violated the Code, but the violation did not affect your rights." A second limitation is that the employee's rights extend only so far as the government agency's would have, had it taken action. Presumably, then, the court must follow the applicable agency's guidelines when determining whether a violation occurred, and also adopt the agency's guidelines as to the appropriate penalty. A third limitation: if a state agency has already cited the employer for a violation, an aggrieved employee cannot file suit on a claim arising out of the same facts.

## Examples

- An employer employs twenty workers at a construction site for four months. The employer pays the workers on a semimonthly basis. The pay stub reflects payroll deductions but omits the number of hours worked and the hourly rates of the workers. Labor Code § 226 requires employers to provide each employee with an itemized statement with each paycheck. The penalty for failing to do so is \$250 per employee per violation. The potential penalty is \$40,000 (20 workers x 8 pay periods x \$250). The workers can sue the employer to collect the penalty, and also recover attorneys' fees and court costs.

- ❑ Labor Code § 207 requires employers to post a notice specifying the regular pay days and the time and place of payment. A restaurant employs 40 workers, paid semimonthly, and has not posted the required notice during the past year. As no penalty is specified in the Labor Code for this violation, the new law provides a penalty of \$4,000 (\$100 penalty x 40 workers) for the first pay period, and \$184,000 for the remaining pay periods (\$200 penalty x 40 workers x 23 pay periods).
- ❑ One day an employee of a print shop is required to clean equipment with acetone (a “hazardous substance”), but he is not provided protective clothing (e.g. gloves) because the items were lost. The employer has violated Labor Code § 6401 (regarding occupational safety and health). The employee can sue to collect the \$7,000 fine.

## Supplement to Existing Remedies

California law already provides ample recourse for employees aggrieved by a variety of violations of the Labor Code. For example, employees already have the right to file actions for wage and hour violations. Employees can pursue administrative claims with the Labor Commission or file civil lawsuits. They already have the right to recover attorney’s fees if they prevail. Further, class action lawsuits regarding wage and hour claims are quite common. In this regard, then, the new law does not add much to the employee’s remedies with regard to wage and hour violations.

Nevertheless, the new law has the potential to make employee class actions much easier to maintain. Currently, employee class actions must be “certified” by the court. Basically the court acts as a gatekeeper and must determine whether the proposed class meets certain legal criteria. The new law may become a way to bypass the certification process because there is no mention of such a requirement in the text. Consequently, it stands to reason that employers will see an increase in employee class action lawsuits.

The fact that monetary penalties have been added for all Labor Code sections will also encourage more lawsuits. Employees (and their lawyers) now have the incentive to sue even where the employees have suffered no economic harm.

## Unanswered Questions

There are a number of unanswered questions regarding the new law. These questions will be resolved by courts as new cases are filed, or by amendment to the law. A few significant issues:

- *Violations Of The Code Only, Or Regulations Too?* The law states an employee can sue for a “violation of this code.” The Labor Code is supplemented by agency regulations. If an employer violates a regulation, can the employee sue under the new law? Arguably yes, because a number of code provisions are empty shells that delegate detailed rulemaking to the labor agencies.
- *Statute Of Limitations?* The new law does not contain a statute of limitations. Arguably, the statute of limitations will be whatever limit applied to agency enforcement claims. For example, a statutory wage claims have a three year statute. A Cal/OSHA claim must be brought within six months of the alleged violation.
- *Jury Trial?* The law is silent on the right of the employee to seek a trial by jury. Generally, the path to court after administrative actions is by writ of mandate, which is decided by a judge rather than jury. Arguably, then, the employee should have no greater right.

## Recommendation: Brush Up On Labor Law

Most employers already exercise their best efforts to comply with the Labor Code. The new law is a wakeup call to employers that strict compliance is a legal obligation that should not be undertaken lightly.

For those with a sense of uncertainty, now would be a good time to review the Labor Code. The Labor Code can be accessed online at: [www.leginfo.ca.gov](http://www.leginfo.ca.gov). Better yet, obtain a printed copy from your local legal bookstore. Attending educational seminars and purchasing practice guides is also recommended. Finally, reviewing personnel policies, job site postings, and other compliance measures with legal counsel may prove to be the ounce of prevention that wards off the next opportunistic plaintiff’s attorney who comes knocking at your employees’ doors.



## Christopher W. Olmsted, Esq.

Direct: (619) 682-4820  
cwo@barkerlawgroup.com

**Practice Area:**  
Civil Litigation

**Areas of Emphasis:**  
Employment Litigation and Labor Law  
Insurance Defense  
Insurance Bad Faith  
Construction Litigation  
Business Litigation

### **Summary:**

Mr. Olmsted is an attorney practicing in the areas of employment litigation and compliance, business litigation, insurance defense, and insurance bad faith. His experience in insurance defense includes automobile, commercial, and homeowners claims, and encompasses personal injury, property damage, mold claims, and wrongful death matters. He has litigated bad faith cases including homeowners, mold, automobile, and disability insurance claims. Additionally, he has represented clients in the areas of business and commercial litigation, asbestos litigation, construction collection and construction defects.

Mr. Olmsted's employment litigation experience includes: FEHA claims regarding race, gender, age, religion, national origin, sexual orientation, disability, pregnancy and sexual harassment; California CFRA and federal FMLA; federal ADA and ADEA; False Claim and whistleblowing actions; public policy violations; ERISA; Labor Board and Unemployment Insurance claims. He has represented clients in state and federal jury and bench trials, appeals before California and federal courts of appeal, judicial and contractual arbitrations, and administrative law hearings. Mr. Olmsted is a member of: San Diego Risk and Insurance Management Society, Association of Business Trial Lawyers, California Bark Employment Law Section and San Diego County Bar Association Insurance Section.

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**Seminars presented include:**

- Speaker on “The Nuts & Bolts of Prevailing Wage Law” for the Engineering General Contractor’s Society, San Diego, December 2, 2003.
- Speaker regarding California Leaves of Absences, Lorman Educational Services Seminar, San Diego, CA, October 15, 2003.
- Speaker on “How to Litigate Your First Civil Trial in California,” National Business Institute, San Diego, CA, 2003.
- Firm-sponsored seminar on Employment Law: Avoiding Liability in the Hiring Process, San Diego, CA, March 27, 2003.

**Pro-Bono Activities:**

- San Diego Volunteer Lawyer Program, Domestic Violence Clinic
- San Diego Volunteer Lawyer Program – Disaster Relief Assistance