

S246911

SUPREME COURT
FILED

SEP 25 2018

No. S246911

Jorge Navarrete Clerk

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

Deputy

JUSTIN KIM,
Plaintiff and Appellant

vs.

REINS INTERNATIONAL CALIFORNIA, INC.
Defendant and Respondent

Appeal Upon a Decision of the Court of Appeal
Second Appellate District, Division Four
Case No. B278642

Appeal from a Judgment of the Superior Court of Los Angeles County
Case No. BC539194

Honorable Kenneth R. Freeman, Judge Presiding

MOTION FOR JUDICIAL NOTICE

*Spencer C. Skeen, CA Bar No. 182216, spencer.skeen@ogletree.com
Tim L. Johnson, CA Bar No. 265794, tim.johnson@ogletree.com
Jesse C. Ferrantella, CA Bar No. 279131, jesse.ferrantella@ogletree.com
Jonathan H. Liu, CA Bar No. 280131, jonathan.liu@ogletree.com
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
4370 La Jolla Village Drive, Suite 990
San Diego, CA 92122
Telephone: 858.652.3100
Facsimile: 858.652.3101

Attorneys for Respondent
Reins International California, Inc.

TO THE COURT, APPELLANT JUSTIN KIM, AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that pursuant to California Evidence Code Sections 451, 452, 453 and 459, as well as California Rules of Court, Rules 3.1113(l), 8.520(g) and 8.252, Respondent Reins International California, Inc. (“Reins”) hereby requests this Court take Judicial Notice of the following exhibits in support of Reins’ Answering Brief:

1. Senate Bill No. 796 (2003-2004 Reg. Sess.) as introduced February 21, 2003 (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit A**”);

2. Senate Judiciary Committee’s Report on Senate Bill No. 796 (2003-2004 Reg. Sess.) as amended April 22, 2003, prepared for the April 29, 2003 Hearing, from the bill file of the Senate Committee on Judiciary (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit B**”);

3. Assembly Committee on Judiciary’s Report on Senate Bill No. 796 (2003-2004 Reg. Sess.) as amended May 12, 2003, prepared for the June 26, 2003 Hearing, from the author’s bill file of Senator Dunn (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit C**”);

4. Senate Committee on Labor and Industrial Relations’ Report on Senate Bill No. 796 (2003-2004 Reg. Sess.) as amended March 26,

2003, prepared for the April 9, 2003 Hearing, from the bill file of the Senate Committee on Labor and Industrial Relations (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit D**”); and

5. Senate Rules Committee, Office of Senate Floor Analyses’ Report on Senate Bill No. 1809 (2003-2004 Reg. Sess.) as amended July 27, 2004, prepared for the July 29, 2004 Senate Floor Hearing, from the bill file of the Office of Senate Floor Analyses (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit F**”).¹

The motion is based upon the records in this case, the attached Memorandum of Points and Authorities, and the attached Declaration of Jan S. Raymond and supporting exhibits.

Respectfully submitted,

Dated: September 24, 2018

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: 

Spencer C. Skeen

Tim L. Johnson

Jesse C. Ferrantella

Jonathan H. Liu

Attorneys for Respondent

Reins International California, Inc.

¹ The Court of Appeal did take judicial notice of Exhibit E.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF MOTION FOR JUDICIAL NOTICE**

Respondent Reins International California, Inc. (“Reins”) hereby respectfully requests this Court take Judicial Notice of the following exhibits in support of Reins’ Answer Brief on the Merits:

1. Senate Bill No. 796 (2003-2004 Reg. Sess.) as introduced February 21, 2003 (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit A**”);

2. Senate Judiciary Committee’s Report on Senate Bill No. 796 (2003-2004 Reg. Sess.) as amended April 22, 2003, prepared for the April 29, 2003 Hearing, from the bill file of the Senate Committee on Judiciary (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit B**”);

3. Assembly Committee on Judiciary’s Report on Senate Bill No. 796 (2003-2004 Reg. Sess.) as amended May 12, 2003, prepared for the June 26, 2003 Hearing, from the author’s bill file of Senator Dunn (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit C**”);

4. Senate Committee on Labor and Industrial Relations’ Report on Senate Bill No. 796 (2003-2004 Reg. Sess.) as amended March 26, 2003, prepared for the April 9, 2003 Hearing, from the bill file of the Senate Committee on Labor and Industrial Relations (a true and correct

copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit D**”); and

5. Senate Rules Committee, Office of Senate Floor Analyses’ Report on Senate Bill No. 1809 (2003-2004 Reg. Sess.) as amended July 27, 2004, prepared for the July 29, 2004 Senate Floor Hearing, from the bill file of the Office of Senate Floor Analyses (a true and correct copy of which is attached to the Declaration of Jan S. Raymond as “**Exhibit F**”).

Appellate courts have the same power as trial courts to take judicial notice of all matters properly subject to such notice. (Cal. Evid. Code § 459; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal. App. 4th 471, 482-83.) California Evidence Code section 459, subdivision (a) provides: “The reviewing court may take judicial notice of any matter specified in Section 452.”

Pursuant to California Evidence Code section 452, subdivision (c), courts may take judicial notice of “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).) This encompasses a broad range of legislative materials, including committee reports and correspondence. (*See Post v. Prati* (1979) 90 Cal. App. 3d 626, 634.)

Here, Respondent requests that this Court take notice of legislative materials relating to Senate Bill Nos. 796 (2003-2004 Reg. Sess.) and 1809 (2003-2004 Reg. Sess.), which were the enacting legislation that eventually

became the Private Attorneys General Act (“PAGA”). The matters requested to be judicially noticed are relevant to the instant appeal because they demonstrate the Legislature intended to prevent individuals without claims and/or injury from pursuing PAGA claims.

For the foregoing reasons, Respondent respectfully requests that the Court take judicial notice of Exhibits A through D and Exhibit F, which are attached Declaration of Jan S. Raymond.

Respectfully submitted,

Dated: September 24, 2018

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: _____


Spencer C. Skeen

Tim L. Johnson

Jesse C. Ferrantella

Jonathan H. Liu

Attorneys for Respondent

Reins International California, Inc.

35661709.1

1
2 **DECLARATION OF JAN S. RAYMOND**

3
4 I, Jan Raymond, declare:

5 1. I am an attorney licensed to practice by the California State Bar, State Bar number
6 88703, and admitted to practice in the United States Federal Court for the Eastern District of
7 California. My business is researching the history and intent of legislative and regulatory
8 enactments and adoptions; I have over 30 years experience in research and analysis of
9 legislative and regulatory intent.

10 2. The attached documents are documents located in the course of research on Senate
11 Bills 796 of 2003 and 1809 of 2004 affecting Labor Code Sections 2698 and 2699.

12 3. Individual documents may appear in multiple locations or files. We endeavor to
13 obtain only one copy of the document. Where it is clearly important, we endeavor to note each
14 source of the document in this declaration. But some documents for which we cite a single
15 source may in fact have been found in multiple locations. Where this raises an issue important
16 in individual circumstances, all source locations of particular documents can be identified upon
17 request.

18 4. All documents included are true and correct copies of the original documents. Unless
19 otherwise noted in this declaration, all documents were obtained at one of the following sources:
20 legislative offices at the State Capitol, the California State Library, the California State Archives,
21 or libraries at the University of California at Davis. References to "bill file" as used in this
22 declaration refer to files maintained regarding the legislation that is the subject of the document
23 collection. Some documents copied from microfilm originals may be of poor quality; all copies
24 included with this report are the best available copies. The following listed documents that
25 accompany this declaration are true and correct copies:
26
27

2003 Chapter 906

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Exhibit A: Senate Bill 796 of 2003 as Introduced on February 21, 2003 Page 1

Exhibit B: Senate Judiciary Committee Analysis prepared for the April 29, 2003 Hearing, from the bill file of the Senate Committee on Judiciary, eight pages. Page 4

Exhibit C: Assembly Judiciary Committee Analysis prepared for the June 26, 2003 Hearing, from the author's bill file of Senator Dunn, seven pages. Page 12

Exhibit D: Senate Labor and Industrial Relations Committee Analysis prepared for the April 9, 2003 Hearing, from the bill file of the Senate Committee on Labor and Industrial Relations, nine pages. Page 19

2004 Chapter 221

Exhibit F: Senate Rules Committee Analysis prepared for the July 29, 2004 Senate Floor Hearing, from the bill file of the Office of Senate Floor Analyses, eight pages. Page 28

This collection ends with page 35

//////////////////////////////////// text continues on next page //////////////////////////////////////

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

I declare under penalty of perjury the foregoing is true and correct.

Executed at Sacramento, California, October 27, 2017.


Jan Raymond

Introduced by Senator Dunn

February 21, 2003

An act to add Part 13 (commencing with Section 2698) to Division 2 of the Labor Code, relating to employment,

LEGISLATIVE COUNSEL'S DIGEST

SB 796, as introduced, Dunn. Employment.

Under existing law, the Labor and Workforce Development Agency and its departments, divisions, commissions, boards, agencies, or employees may assess and collect penalties for violations of the Labor Code.

This bill would allow aggrieved employees to bring civil actions to recover these penalties, if the agency or its departments, divisions, commissions, boards, agencies, or employees do not do so. The penalties collected in these actions would be distributed 50% to the General Fund, 25% to the agency for education, to be available for expenditure upon appropriation by the Legislature, and 25% to the aggrieved employee. In addition, the aggrieved employee would be authorized to recover attorney's fees and costs. For any violation of the code for which no civil penalty is otherwise established, the bill would establish a civil penalty.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. The Legislature finds and declares all of the
- 2 following;

1 (a) Adequate financing of essential labor law enforcement
2 functions is necessary to achieve maximum compliance with state
3 labor laws in the underground economy and to ensure an effective
4 disincentive for employers to engage in unlawful and
5 anti-competitive business practices.

6 (b) Although innovative labor law education programs and
7 self-policing efforts by industry watchdog groups may have some
8 success in educating some employers about their obligations under
9 state labor laws, in other cases the only meaningful deterrent to
10 unlawful conduct is the vigorous assessment and collection of civil
11 penalties as provided in the Labor Code.

12 (c) Staffing levels for state labor law enforcement agencies
13 have, in general, declined over the last decade and are likely to fail
14 to keep up with the growth of the labor market in the future.

15 (d) It is therefore in the public interest to provide that civil
16 penalties for violations of the Labor Code may also be assessed and
17 collected by aggrieved employees acting as private attorneys
18 general, while also ensuring that state labor law enforcement
19 agencies' enforcement actions have primacy over any private
20 enforcement efforts undertaken pursuant to this act.

21 SEC. 2. Part 13 (commencing with Section 2698) is added to
22 Division 2 of the Labor Code, to read:

23
24 **PART 13. THE LABOR CODE PRIVATE ATTORNEYS**
25 **GENERAL ACT OF 2004**
26

27 2698. This part shall be known and may be cited as the Labor
28 Code Private Attorneys General Act of 2004.

29 2699. (a) Notwithstanding any other provision of law, any
30 provision of this code that provides for a civil penalty to be
31 assessed and collected by the Labor and Workforce Development
32 Agency or any of its departments, divisions, commissions, boards,
33 agencies, or employees, for a violation of this code, may, as an
34 alternative, be recovered through a civil action.

35 (b) For all provisions of this code except those for which a civil
36 penalty has already been established, there is established a civil
37 penalty for a violation of these provisions, as follows:

38 (1) If no criminal penalty amount has been established for a
39 violation of the provision, the civil penalty is one hundred dollars
40 (\$100) per employee per pay period for the initial violation and

1 two hundred dollars (\$200) per employee per pay period for each
2 subsequent violation. If the person does not employ one or more
3 employees, the civil penalty is five hundred dollars (\$500).

4 (2) If a criminal penalty has been established for a violation of
5 the provision, the civil penalty is the amount of the criminal
6 penalty, or one hundred dollars (\$100) per employee per pay
7 period for the initial violation and two hundred dollars (\$200) per
8 employee per pay period for each subsequent violation, whichever
9 is greater. If the person does not employ one or more employees,
10 the civil penalty shall be the amount of the criminal penalty or five
11 hundred dollars (\$500), whichever is greater.

12 (c) An aggrieved employee may recover the civil penalty
13 described in subdivision (b) in a civil action filed on behalf of
14 himself or herself or others. Any employee who prevails, in whole
15 or in part, in any action shall be entitled to an award of reasonable
16 attorney's fees and costs. Nothing in this section shall operate to
17 limit an employee's right to pursue other remedies available under
18 state or federal law, either separately or concurrently with an
19 action taken under this section.

20 (d) No action may be maintained under this section by an
21 aggrieved employee if the agency or any of its departments,
22 divisions, commissions, boards, agencies, or employees, on the
23 same facts and theories, cites a person for a violation of the code
24 and initiates proceedings to collect applicable penalties.

25 (e) Civil penalties recovered by aggrieved employees shall be
26 distributed as follows: 50 percent to the General Fund, 25 percent
27 to the Labor and Workforce Development Agency for education
28 of employers and employees about their rights and responsibilities
29 under this code, available for expenditure upon appropriation by
30 the Legislature, and 25 percent to the aggrieved employees.

. 0

SENATE JUDICIARY COMMITTEE

**Martha M. Escutia, Chair
2003-2004 Regular Session**

SB 796	S
Senator Dunn	B
As Amended April 22, 2003	
Hearing Date: April 29, 2003	7
Labor Code	9
CJW	6

SUBJECT

Employment

DESCRIPTION

This bill would allow employees to sue their employers for civil penalties for employment law violations, and upon prevailing, to recover costs and attorneys' fees. The bill is intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative "private attorney general" system for labor law enforcement.

This analysis reflects author's amendments to be offered in Committee.

BACKGROUND

California's Labor Code is enforced by the state Labor and Workforce Development Agency (LWDA) and its various boards and departments, which may assess and collect civil penalties for specified violations of the code. Some Labor Code sections also provide for criminal sanctions, which may be obtained through actions by the Attorney General and other public prosecutors.

In 2001, the Assembly Committee on Labor and Employment held hearings about the effectiveness and efficiency of the enforcement of wage and hour laws by the Department of Industrial Relations (DIR), one of four subdivisions of the LWDA. The Committee reported that in fiscal year 2001-2002, the Legislature appropriated over \$42 million to the State Labor Commission for the enforcement of over 300 laws under its jurisdiction. The DIR's authorized staff numbered over 460, making it the largest state labor law enforcement organization in the country.

Nevertheless, evidence received by the Committee indicated that the DIR was failing to effectively enforce labor law violations. Estimates of the size

California's "underground economy" - businesses operating outside the state's tax and licensing requirements - ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but the DIR was currently issuing fewer than 100 wage citations per year for all industries throughout the state.

As a result of these hearings, the Legislature enacted AB 2985 (Ch. 662, Stats. of 2002), requiring the LWDA to contract with an independent research organization to study the enforcement of wage and hour laws, and to identify state and federal resources that may be utilized to enhance enforcement. The completed study is to be submitted to the Legislature by December 31, 2003.

This bill would propose to augment the LWDA's civil enforcement efforts by allowing employees to sue employers for civil penalties for labor law violations, and to collect attorneys' fees and a portion of the penalties upon prevailing in these actions, as specified below.

CHANGES TO EXISTING LAW

Existing law authorizes the LWDA (comprised of the DIR, the Employment Development Department, the Agricultural Labor Relations Board, and the Workforce Investment Board) to assess and collect civil penalties for violations of the Labor Code, where specified. [Labor Code Secs. 201 et seq.]

Existing law authorizes the Attorney General and other public prosecutors to pursue misdemeanor charges against violators of specified provisions of the code. [Labor Code Sec. 215 et seq.]

Existing law authorizes an individual employee to file a claim with the Labor Commissioner alleging that his or her employer has violated specified provisions of the code, and to sue the employer directly for damages, reinstatement, and other appropriate relief if the Commissioner declines to bring an action based on the employee's complaint. [Labor Code Sec. 98.7.]

Existing law further provides that any person acting for itself, its members, or the general public, may sue to enjoin any unlawful, unfair, or fraudulent business act or practice, and to recover restitution and disgorgement of any profits from the unlawful activity. [Bus. & Profs. Code Sec. 17200 et seq.]

This bill would provide that any Labor Code violation for which specific civil penalties have not previously been established shall be subject to a civil penalty of \$100 for each aggrieved employee per pay period for an initial violation, and

\$200 for each aggrieved employee per pay period for continuing violations. (The penalty would be \$500 per violation for a violator who is not an employer.)

This bill further would provide that, for any Labor Code violation for which the LWDA does not pursue a complaint, any aggrieved employee may sue to recover civil penalties in an action brought on behalf of himself or herself or other current or former employees.

This bill would define "aggrieved employee" as "any person employed by the alleged violator within the period covered by the applicable statute of limitation against whom one or more of the violations alleged in the action was committed."

This bill further would provide that an aggrieved employee who prevails in such an action shall be entitled to an award of reasonable attorney's fees and costs.

This bill further would provide that any penalties recovered in an action by an aggrieved employee shall be distributed as follows: 50 percent to the General Fund, 25 percent to the LWDA for employer education, and 25 percent to the aggrieved employees. (Penalties recovered against a violator who is not an employer, which under this bill could be pursued only by a public prosecutor or the LWDA, would be divided evenly between the General Fund and the LWDA.)

This bill further would provide that nothing in this section shall limit an employee's right to pursue other remedies available under state or federal law.

This bill further would provide that no action may be maintained by an aggrieved employee under this section where the LWDA initiates proceedings against the alleged violator on the same facts and under the same section or sections of the Labor Code.

COMMENT

1. Stated need for legislation

The California Labor Federation, co-sponsor, states that this bill would "attack the underground economy and enhance our state's revenues" by allowing workers to crack down on labor violators:

In the last decade, as California has grown to become one of the world's largest economies, state government labor law enforcement functions have failed to keep pace. . . . The state's current inability to enforce our existing labor laws effectively is due to inadequate staffing and to the continued growth of the underground economy. This inability coupled

with our severe state budget shortfall calls for a creative solution that will help the state crack down on those who choose to flout our laws.

The California Rural Legal Assistance (CRLA) Foundation, also a co-sponsor, states that violations of minimum or overtime wage violations are common, and many other violations for which only rarely enforced criminal penalties exist are increasing. For example, "company store" arrangements in which workers are required to cash their checks with their employer, for a fee, allegedly are widespread in the agricultural industry. The CRLA Foundation notes that the bill's proposed penalty structure is "nominal" and is based on existing provisions of the Labor Code.

Protection & Advocacy, Inc., which supports the rights of people with disabilities, asserts that SB 796 will assist disabled employees "by providing some mechanism by which to get an employer to comply with the Labor Code."

2. SB 796 would attach civil penalties to existing provisions

The sponsors state that many Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, Labor Code violations rarely result in criminal investigations and prosecutions.

Accordingly, this bill would attach a civil penalty of \$100 for each aggrieved employee per pay period (increasing to \$200 for each aggrieved employee per pay period for continuing violations) to any Labor Code provision that does not already contain a financial penalty for its violation. The sponsors state that this proposed penalty is "on the low end" of existing civil penalties attached to other Labor Code provisions, but should be significant enough to deter violations.

3. The bill would allow "aggrieved employees" to bring private actions to recover the civil penalties

The sponsors state that private actions to enforce the Labor Code are needed because LWDA simply does not have the resources to pursue all of the labor violations occurring in the garment industry, agriculture, and other industries.

Although the Unfair Competition Law (UCL), Section 17200 of the Business & Professions Code, permits private actions to enjoin unlawful business acts, the sponsors assert that it is an inadequate tool for correcting Labor Code violations. First, the UCL only permits private litigants to obtain injunctive relief and restitution, which the sponsors say is not a sufficient deterrent to

labor violations. Second, since the UCL does not award attorneys' fees to a prevailing plaintiff, few aggrieved employees can afford to bring an action to enjoin the violations. Finally, since most employees fear they will be fired or subject to hostile treatment if they file complaints against their employers, they are discouraged from bringing UCL actions.

Generally, civil enforcement statutes allow civil penalties to be recovered only by prosecutors, not by private litigants. Private plaintiffs who have been damaged by a statutory violation usually are restricted to traditional damage suits, or where damages are difficult to prove, to "statutory damages" in a specified amount or range. [See, e.g., Unruh Civil Rights Act, Civ. Code Sec. 51 et seq., allowing statutory damages in a minimum amount of \$4,000 per violation to prevailing private litigants in actions alleging denial of equal access or other forms of discrimination.]

In this bill, allowing private recovery of civil penalties as opposed to statutory damages would allow the penalty to be dedicated in part to public use (to the General Fund and the LWDA) instead of being awarded entirely to a private plaintiff, as would occur with a damage award. Recovery of civil penalties by private litigants does have some precedent in existing law: The Unruh Civil Rights Act allows either the victim of a hate crime or a public prosecutor to bring an action for a civil penalty of \$25,000 against the perpetrator of the crime. (Civ. Code Secs. 51.7, 52.)

4. Opponents' concerns

The employer groups opposing the bill argue that SB 796 will encourage private attorneys to "act as vigilantes" pursuing any and all types of Labor Code violations on behalf of different employees, and that this incentive will be increased by allowing employees to recover both attorneys' fees and a portion of the penalties. A representative letter states:

There is a major concern that this type of statute could be abused in a manner similar to the legal community's abuse of Business and Professions Code Section 17200 when it sued thousands of small businesses for minor violations and demanded settlements in order to avoid costly litigation.

The California Chamber of Commerce argues that, since the bill would award attorneys' fees to prevailing employees, but not to employers when they prevail, SB 796 would clog already-overburdened courts because there would be no disincentive to pursue meritless claims.

The California Employment Law Council states that the the Labor Code contains "innumerable penalty provisions, many of which would be

applicable to minor and inadvertent actions." Under current law, however, the prospect of excessive penalties is mitigated by prosecutorial discretion, which would disappear under SB 796:

If, for example, a large employer inadvertently omitted a piece of information on a paycheck, a "private attorney general" could sue for penalties that could reach staggering amounts if . . . the inadvertent deletion of information on a paycheck went on for some time.

5. Sponsors say bill has been drafted to avoid abuse of private actions

The sponsors are mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse. First, unlike the UCL, this bill would not open private actions up to persons who suffered no harm from the alleged wrongful act. Instead, private suits for Labor Code violations could be brought only by an "aggrieved employee" - an employee of the alleged violator against whom the alleged violation was committed. (Labor Code violators who are not employers would be subject to suit only by the LWDA or by public prosecutors.)

Second, a private action under this bill would be brought by the employee "on behalf of himself or herself or others" - that is, fellow employees also harmed by the alleged violation - instead of "on behalf of the general public," as private suits are brought under the UCL. This would dispense with the issue of res judicata ("finality of the judgment") that is the subject of some criticism of private UCL actions. An action on behalf of other aggrieved employees would be final as to those plaintiffs, and an employer would not have to be concerned with future suits on the same issues by someone else "on behalf of the general public."

Third, the proposed civil penalties are relatively low, most of the penalty recovery would be divided between the LWDA (25 percent) and the General Fund (50 percent), and the remaining 25 percent would be divided between all identified employees aggrieved by the violation, instead of being retained by a single plaintiff. This distribution of penalties would discourage any potential plaintiff from bringing suit over minor violations in order to collect a "bounty" in civil penalties.

Finally, the bill provides that no private action may be brought when the LWDA or any of its subdivisions initiates proceedings to collect penalties on the same facts and under the same code provisions.

6. Author's amendments

In order to address concerns that the bill might invite frivolous suits or impose excessive penalties, and pursuant to discussions between the sponsors and Committee staff, the author has agreed to accept the following amendments to clarify the bill's intended scope of its private right of action and the assessment and distribution of its civil penalties:

- (a) To clarify who would qualify as an "aggrieved employee" entitled to bring a private action under this section, the author will define the term as follows (at page 2, line 38):

"For purposes of this part, an aggrieved employee means any person employed by the alleged violator within the period covered by the applicable statute of limitations against whom one or more of the violations alleged in the action was committed."

The bill would further be amended to reflect that any civil penalty recoverable by the LWDA under existing law may be recovered through a civil action "brought by an aggrieved employee on behalf of himself or herself or other current or former employees" (at page 2, lines 31-36).

- (b) To clarify that civil penalties would be assessed only with respect to the number of employees aggrieved by the violation, as opposed to the total number of an alleged violator's employees, the author will amend the bill to reflect that penalties will be determined "for each aggrieved employee" instead of "per employee" (at page 3, lines 7 and 8).

- (c) To allay opponents' concerns that res judicata issues may arise if all known potential plaintiffs are not included in the private action, the author will amend the bill as follows (at page 3, lines 11-13):

"An aggrieved employee may recover the civil penalty described in subdivision (b) in a civil action filed on behalf of himself or herself or others other current or former employees for whom evidence of a violation was developed during the trial or at settlement of the action."

- (d) To conform its attorney's fees provision with similar provisions in existing law, the author will amend the bill to delete the phrase "in whole or in part" from the provision allowing attorney's fees to be awarded to a prevailing plaintiff (at page 3, lines 13-14).

Support: American Federation of State, County and Municipal Employees (AFSCME); California Conference Board of the Amalgamated Transit Union; California Council of Machinists; California Independent Public Employees Legislative Council; California State Pipe Trades Council; California State Association of Electrical Workers; California Teamsters; Engineers and Scientists of California, Local 20; Hotel Employees, Restaurant Employees International Union; Professional and Technical Engineers, Local 21; Protection & Advocacy, Inc.; Region 8 States Council of the United Food & Commercial Workers; Western States Council of Sheet Metal Workers

Opposition: Associated General Contractors of California; California Apartment Association; California Chamber of Commerce; California Employment Law Council; California Landscape Contractors Association; California Manufacturers and Technology Association; Civil Justice Association of California (CJAC); Construction Employers' Association; Motion Picture Association of America; Orange County Business Council

HISTORY

Source: California Labor Federation AFL-CIO; CRLA Foundation

Related Pending Legislation: None Known

Prior Legislation: AB 2985 (Committee on Labor and Private Employment) (Ch. 662, Stats. of 2002) (requires Labor and Workforce Development Agency to contract with independent research organization to study most effective ways to enforce wage and hour laws, and to identify all available state and federal resources available for enforcement; completed study to be submitted to Legislature by December 31, 2003)

Prior Vote: Senate Labor & Industrial Relations Committee 5-3
