BIBIYAN LAW GROUP, P.C.

David D. Bibiyan
Attorney at Law
1460 Westwood Blvd.
Los Angeles, California 90024
310.438.5555 T
310.300.1705 F
david@tomorrowlaw.com
www.tomorrowlaw.com

August 17, 2026

VIA E-MAIL ONLY

Danielle West
PAGA Rulemaking and Policy Analyst
California Labor and Workforce Development Agency
1416 Ninth Street (MIC-55)
Sacramento, California 95814
danielle.west@labor.ca.gov
C/O *alisa.melendez-collier@labor.ca.gov*

Re: Public Comment on LWDA Proposed California Code of Regulations Sections 17400 *et seq.*

Ms. West,

Bibiyan Law Group, P.C. respectfully submits these comments regarding the Labor and Workforce Development Agency's ("LWDA") proposed regulations implementing the Private Attorneys General Act of 2004 ("PAGA").

The Initial Statement of Reasons identifies legitimate objectives: improving the quality of PAGA notices, facilitating efficient administrative review, and improving the operation of the Act's prelitigation procedures. The question presented by this rulemaking, however, is not whether those objectives are desirable. It is whether the mechanisms selected are reasonably necessary to accomplish them and appropriately implement the Legislature's statutory framework.

Several of the proposed provisions appear insufficiently connected to those objectives. Rather than focusing principally on what a PAGA notice must contain, the regulations increasingly regulate who files the notice and impose consequences based on characteristics of the filer, including filing volume and prior Agency determinations. Most significantly, the proposed employer-response procedure risks transforming the statutory notice process into a prelitigation adjudication of factual and legal disputes on an inherently asymmetrical record—one in which the employer may supplement the record with evidence while the employee has no comparable opportunity to obtain or rebut that evidence.

These concerns are not merely procedural. The proposed framework may ultimately impose continuing consequences on attorneys based upon determinations reached under those same standards and procedures. The regulations would therefore benefit from a more direct connection between the Agency's stated objectives and the mechanisms used to achieve them: objective standards governing notice content, meaningful opportunities to cure identified deficiencies, and administrative procedures that do not convert prelitigation notice review into one-sided merits adjudication.

1. **The High-Frequency Filer Designation Does Not Appear Reasonably Necessary to Advance the Agency's Stated Objectives**

The Initial Statement of Reasons devotes considerable attention to filing statistics, noting that a relatively small number of attorneys and law firms account for a significant percentage of PAGA notices. Those statistics establish that filing volume differs among practitioners. They do not, however, establish the proposition necessary to support the proposed designation: that attorneys or firms filing larger numbers of notices also file a higher percentage of legally deficient notices.

The Statement of Reasons does not identify the percentage of notices determined to be deficient, compare deficiency rates among firms of different sizes, or otherwise explain why filing volume is an appropriate proxy for notice quality. Without that analytical connection, the proposed designation appears directed toward the identity and activity of the filer rather than the quality of the notice itself.

That distinction matters because filing volume is not inherently evidence of deficient practice. PAGA was enacted because the Legislature determined that public enforcement resources alone were insufficient to ensure meaningful compliance with California labor laws. The statutory framework therefore relies upon private enforcement on behalf of the State. Firms capable of undertaking large numbers of matters necessarily require substantial organizational resources, particularly as PAGA litigation may involve complex procedural and substantive issues and, in appropriate cases, parallel proceedings involving individual claims.

The proposed designation consequently risks measuring the scale of an attorney's practice rather than the quality of the attorney's notices. A practitioner who files many well-supported notices should not be treated as presenting a greater administrative problem merely because of filing volume.

The numerical threshold likewise appears insufficiently supported by an articulated methodology. The Agency substantially revised the proposed thresholds between rulemaking drafts, but the Statement of Reasons does not identify an empirical basis explaining why the revised figures provide a reliable means of distinguishing problematic filing practices. Without such an explanation, the selected threshold appears to reflect a policy judgment rather than a demonstrated administrative necessity.

The proposal also creates two practical concerns that appear inconsistent with the Agency's stated objectives. First, the designation may operate retrospectively by counting notices filed before the regulation takes effect, thereby attaching regulatory consequences to conduct undertaken before practitioners had an opportunity to conform their practices to the new standard. Second, because the regulations broadly define a "PAGA notice" while separately recognizing amended notices, the proposal may inadvertently count amended notices toward the numerical threshold. Such an interpretation could discourage practitioners from amending notices as additional facts become available, even though additional factual information may be precisely what permits a notice to become more accurate and complete. If the objective is to improve notice quality, the regulations should encourage correction and refinement when additional information becomes available, not create incentives against amendment.

For these reasons, the Agency should reconsider whether filing volume is an appropriate measure of notice quality. If heightened review is retained, it should instead be tied to objectively identifiable deficiencies in notice content, apply prospectively, and expressly exclude amended notices from any filing-volume calculation.

2. **The Proposed Non-Compliant Filer Provisions Impose Significant Professional Consequences Without Sufficiently Objective Standards**

The Agency has a legitimate interest in ensuring that PAGA notices satisfy the statutory requirements and provide sufficient information to permit meaningful administrative review. The proposed non-compliant filer provisions do not provide sufficiently objective standards by which practitioners can determine in advance whether a notice will be deemed compliant, nor do they provide a meaningful opportunity to cure an identified deficiency before the consequences of a non-compliant determination may attach.

The proposed regulations identify categories of allegations that may be considered insufficient, including allegations that are "conclusory," "generalized," or "vague." They provide substantially less guidance concerning what factual allegations will ordinarily satisfy the Agency's requirements. Practitioners are therefore given significant direction concerning what the Agency may reject, but comparatively little affirmative guidance concerning what the Agency will accept. And that uncertainty is consequential. Whether factual allegations are sufficiently particularized is not always self-evident, and reasonable practitioners may disagree about the level of factual detail necessary to satisfy a notice requirement, particularly at the prelitigation stage. PAGA notices are prepared before discovery and often before the employee has access to records maintained exclusively by the employer. The regulations should account for that reality rather than effectively requiring practitioners to anticipate the Agency's preferred level of factual specificity without sufficiently defined standards.

The concern is heightened because a determination that a notice is non-compliant may have consequences beyond the individual notice. Repeated determinations may ultimately contribute to a non-compliant filer designation and prefiling screening, thereby affecting an attorney's ability to submit future PAGA notices without additional Agency review. The greater the consequence of a determination, the greater the need for objective standards governing the underlying finding. The proposed framework should therefore distinguish between a notice that fails to satisfy an objectively defined requirement and a notice that the Agency believes could have been drafted with greater factual detail. The former may warrant regulatory consequences; the latter should ordinarily be addressed through guidance or an opportunity to cure.

The Agency's requirement that a filer receive a warning before a non-compliant filer designation is an important procedural protection, but a warning is not the same as an opportunity to cure. If the Agency identifies a deficiency that can be corrected, the regulations should provide the filer a reasonable opportunity to correct it and should make clear that a notice timely amended to cure the identified deficiency will not count toward the threshold for a non-compliant filer designation.

Such a procedure would directly advance the Agency's stated objective of improving the quality of PAGA notices. It would tell practitioners what the Agency considers deficient, allow them to correct the deficiency, and reserve the more serious consequences of non-compliance for repeated failures to comply with clearly defined requirements.

Accordingly, the Agency should establish affirmative and objective standards identifying what constitutes a compliant notice, require the Agency to identify the specific deficiency upon which a non-compliant determination is based, and provide a meaningful opportunity to cure that deficiency before the notice contributes to a non-compliant filer designation.

3. The Employer Response Procedure Creates an Unnecessary, One-Sided Adjudicatory Process That Is Inconsistent with the Agency's Stated Objectives and Exceeds its Administrative Role

The proposed employer-response procedure presents a different and more fundamental concern. It risks transforming the statutory notice process from an administrative mechanism for informing the Agency and the employer of alleged Labor Code violations into a preliminary adjudication of factual and legal disputes without the procedural protections that ordinarily accompany such adjudication.

A. <u>The Procedure is Difficult to Reconcile with the Agency's Stated Objective of Administrative Efficiency</u>

The Initial Statement of Reasons repeatedly explains that the proposed regulations are intended to improve administrative efficiency by facilitating review of PAGA notices and assisting the Agency in identifying matters warranting investigation or administrative action. The proposed employer-response procedure, however, is likely to increase rather than reduce the Agency's administrative burden.

Under the proposed regulations, employers may submit substantive responses addressing the factual and legal sufficiency of PAGA notices. Such responses are unlikely to be limited to information useful to the Agency's administrative review. Employers have an obvious incentive to dispute whether a notice adequately alleges the requisite facts and theories, whether violations are sufficiently described, and whether the allegations are supported by the available evidence. Each such submission creates an additional body of factual and legal material for Agency review before an investigation has commenced. The Agency may therefore be required to evaluate competing factual narratives and legal arguments at a stage when neither side has had the benefit of discovery.

That consequence is difficult to reconcile with the Agency's stated objective of administrative efficiency. If the purpose of the notice process is to allow the Agency to determine whether an investigation is warranted, requiring the Agency to adjudicate competing factual accounts before deciding whether to investigate risks creating precisely the additional administrative work the proposed regulations are intended to reduce. More fundamentally, the procedure risks changing the function of the statutory notice period itself. The Legislature established the notice process to provide the Agency an opportunity to determine whether it should investigate alleged Labor Code violations and to provide the employer with notice of those allegations. The proposed procedure instead risks turning that period into a preliminary dispute over whether the employee's allegations are factually and legally sufficient.

If the employer response is intended merely to provide information relevant to whether the Agency should investigate, the regulations should make that limited function clear. If, instead, the Agency intends to consider the employer's evidence in determining whether the employee's notice is factually or legally sufficient, the procedure becomes a form of prelitigation adjudication that requires substantially greater procedural safeguards.

B. The Procedure Duplicates Issues Already Addressed Through the Judicial Process

The proposed procedure is also unnecessary to the extent it creates a parallel mechanism for resolving issues concerning the legal sufficiency and factual basis of PAGA claims that courts are already equipped to address.

If the question is whether a PAGA plaintiff has adequately stated the facts and theories supporting alleged Labor Code violations, that issue can be presented to and adjudicated by a court in the ordinary course of litigation. The proposed employer-response procedure instead creates a mechanism through which the Agency may be asked to evaluate substantially similar questions before litigation has proceeded and before the parties have access to the procedural tools ordinarily available in court.

The distinction is important. A demurrer permits a court to test the legal sufficiency of a pleading without resolving disputed facts through extrinsic evidence. Where a party seeks to rely upon evidence outside the pleadings to resolve factual issues, the judicial process provides procedures governing discovery, presentation of evidence, briefing, and response by both sides.

The proposed administrative procedure provides no comparable structure. It potentially combines the evidentiary advantages of a merits-based proceeding with the procedural limitations of a prelitigation pleading review: the employer may present evidence challenging the employee's allegations, while the employee is not afforded discovery necessary to obtain responsive evidence or a defined opportunity to rebut the employer's submission.

That is not simply a difference in procedure. It changes the substance of the Agency's review. If the Agency is determining only whether a notice adequately identifies the alleged violations, employer evidence concerning the ultimate truth of those allegations should have limited relevance. If the Agency is instead evaluating that evidence to determine whether the notice is sufficiently supported, it is effectively being asked to resolve factual disputes before the parties have had the opportunity to develop the record through discovery.

The Agency should therefore explain why this additional adjudicatory mechanism is necessary when courts already possess authority to adjudicate the legal sufficiency and factual merits of PAGA claims and when the Legislature did not expressly establish a parallel prelitigation adjudication of disputed factual and legal issues by the Agency.

C. The Procedure is Inherently Asymmetrical Because the Employer Controls Much of the Relevant Evidence

The procedural concern is particularly serious because the parties do not begin with equal access to information. At the prelitigation stage, an employee and counsel ordinarily possess substantially less information concerning the employer's practices than the employer itself. Relevant payroll, timekeeping, scheduling, personnel, policy, and other employment records are frequently maintained exclusively by the employer and may not be available to the employee before litigation or discovery.

The employee's account may therefore necessarily be based upon personal observations and recollections. An employee may accurately describe what occurred without possessing the records necessary to establish its full scope, duration, frequency, or legal characterization. Employees may also be unfamiliar with the technical requirements of California wage-and-hour law and therefore describe the underlying conduct rather than its precise legal significance. The absence of employer-controlled records at the notice stage should not be equated with the absence of a factual basis for the allegation.

The proposed procedure nevertheless permits the employer to submit evidence and argument challenging the factual and legal sufficiency of the employee's notice. The regulations do not expressly provide the employee or counsel with a corresponding opportunity to conduct discovery, obtain the employer's records, submit responsive evidence, or reply to the employer's submission before the Agency makes its determination.

The resulting process is inherently asymmetrical. The employee may be required to defend the adequacy of a prelitigation notice based principally upon information available from the employee, while the employer may seek to undermine that notice using records and information uniquely within the employer's possession.

The Agency should not confuse the absence of evidence presently available to the employee with the absence of a factual basis for the allegation. Nor should the Agency conflate two fundamentally different questions: whether a notice adequately informs the Agency and employer of the alleged violations, and whether the employer possesses evidence that may ultimately disprove those allegations. A notice may adequately state facts and theories even if the employer disputes those facts or possesses evidence bearing upon their merits. The existence of a factual dispute does not necessarily establish that the notice was inadequately pleaded.

Indeed, permitting the employer to introduce evidence contradicting the employee's allegations may establish nothing more than the existence of a factual dispute—the very type of dispute for which discovery and judicial adjudication ordinarily exist.

The Agency should therefore not use the employer-response procedure to resolve disputed factual questions that cannot fairly be evaluated from the notice itself. Doing so would effectively convert the employer's superior access to information into a procedural advantage in determining whether the employee's notice is compliant.

D. The Asymmetry is Particularly Significant Because the Determination May Affect Counsel's Future PAGA Practice

The foregoing concerns would be significant even if an adverse determination merely resulted in the Agency declining to investigate a particular notice. They become substantially more consequential because repeated non-compliant determinations may contribute to a non-compliant filer designation and prefiling screening.

An attorney may be attempting in good faith to comply with the Agency's notice requirements based upon information reasonably available from the employee at the prelitigation stage. The employer, possessing the underlying employment records, may then submit those records and its competing factual and legal characterization to the Agency. If the Agency accepts that characterization and determines that the notice was non-compliant, the determination may contribute to consequences affecting the attorney's future PAGA filings.

The concern, therefore, is not simply that one party receives an evidentiary advantage in an administrative proceeding. It is that an evidentiary advantage created by the parties' unequal access to information may contribute to a regulatory determination carrying consequences beyond the individual dispute.

The greater the potential consequence, the more important it is that the underlying determination be made under clear standards and through a procedure that affords both sides a meaningful opportunity to present their respective positions.

E. The Regulations Do Not Clearly Identify What the Agency is Determining or the Standards Governing That Determination

The proposed regulations also leave unresolved several basic questions concerning the Agency's review of an employer response. The regulations do not clearly identify:

- whether the Agency is determining pleading sufficiency, factual credibility, standing, legal sufficiency, or whether an investigation is warranted;
- what evidentiary standard governs the Agency's review;
- what burden of proof, if any, applies;
- whether the Agency may resolve disputed factual questions;
- what evidence the Agency may consider;
- whether the employee or attorney is entitled to respond to an employer's submission;
- whether the employee may obtain additional information before the Agency makes its determination;
- whether the Agency must disclose the evidence upon which it intends to rely;
- whether the Agency must provide a written explanation of its determination; and

- what statutory authority authorizes the Agency to adjudicate disputed factual and legal questions through this process.

These are not technical omissions. They go directly to the nature of the proceeding the regulations would create.
The Agency plainly possesses authority to promulgate regulations implementing PAGA. The more specific question is whether that authority permits the Agency to transform the notice-review process into an adversarial adjudication of disputed factual and legal sufficiency in which one party may supplement the record with evidence while the other is not afforded corresponding discovery and rebuttal rights.

If the Agency intends to exercise such authority, it should identify the statutory provision upon which it relies and explain why that provision authorizes the particular procedure proposed here.

F. If Employer Responses Are Retained, They Should Be Limited or Made Reciprocal

If the Agency concludes that employer input would assist its administrative review, the regulations should narrowly define the permissible scope of an employer response.

Employer responses could be limited to information directly relevant to the Agency's administrative functions. For example, the response may be limited to information concerning whether the employer intends to cure alleged violations, whether another government agency is already investigating the matter, or other information bearing directly upon whether Agency investigation is appropriate. Such a limitation would allow employers to assist the Agency without creating a parallel proceeding on the merits.

Alternatively, if the Agency intends to permit substantive employer challenges to the factual or legal sufficiency of PAGA notices, the regulations should establish a genuinely reciprocal procedure. At a minimum, the filer should receive the employer's submission, have a defined opportunity to respond, have access to the evidence upon which the Agency intends to rely, and be permitted to submit responsive evidence and argument.

The Agency should not make an adverse determination concerning notice sufficiency based upon evidence that has not been disclosed to the filer or that the filer has had no meaningful opportunity to address.

Finally, an employer response should not substitute for the filer's opportunity to cure. If the Agency identifies a deficiency in a notice, the filer should be given a reasonable opportunity to correct that deficiency before the notice contributes to a non-compliant filer designation.

That approach would preserve the Agency's ability to obtain useful information from employers while maintaining the critical distinction between administrative review of a notice and adjudication of disputed factual merits.

The Agency can improve the quality of PAGA notices without creating a one-sided prelitigation adjudication. The regulations should provide clear standards for what constitutes a compliant notice, give filers a meaningful opportunity to cure identified deficiencies, and reserve factual disputes requiring discovery and evidentiary adjudication for the judicial process designed to resolve them.

4. Conclusion

The Agency's objectives are legitimate. Improving the quality of PAGA notices and facilitating efficient administrative review benefit employees, employers, practitioners, and the Agency alike. The concern is that the proposed regulations increasingly pursue those objectives by regulating the attorneys who file PAGA notices rather than the notices themselves. That distinction is reflected throughout the proposed framework.

The high-frequency filer provisions do not measure the quality of a notice; they measure how many notices an attorney or firm files. The non-compliant filer provisions do not simply identify deficiencies and permit them to be corrected; they establish a framework under which repeated determinations concerning prior notices may result in consequences for the filer's future practice. And the employer-response procedure does not merely assist the Agency in reviewing a notice; it risks creating a process through which an employer may provide evidence and argument directed at establishing that the employee's notice is deficient, without providing the employee a comparable opportunity to obtain or rebut that evidence.

The cumulative effect is therefore important. A regulatory scheme ostensibly directed toward improving PAGA notices increasingly becomes a regulatory scheme directed toward the conduct of PAGA attorneys and firms. Filing volume becomes a basis for heightened scrutiny. Prior notice determinations become relevant to future filing privileges. And the employer's response may become evidence used to generate those adverse determinations in the first place.
That is a significant departure from a framework focused on notice quality.

If a PAGA notice is deficient, the most direct way to improve the quality of PAGA notices is to identify the deficiency and provide the filer with a clear opportunity to correct it. If the Agency believes particular information must be included in every notice, it should say so through objective standards and illustrative examples. If the Agency believes a notice does not satisfy those standards, it should identify the deficiency and permit the filer to cure it. And if the Agency believes an employer possesses information relevant to whether an investigation is warranted, the employer should be permitted to provide that information without transforming the notice process into an adversarial adjudication of disputed factual issues.

Those mechanisms would regulate the <u>notice.</u> The proposed framework instead too often regulates the <u>filer</u>. This distinction is particularly important considering PAGA's statutory structure. The PAGA assigns the Agency an important administrative role while also preserving private enforcement as a means of enforcing the Labor Code on behalf of the State. The Legislature could have addressed deficient notices by establishing clearer requirements concerning notice content and procedures for curing deficiencies. The Agency should therefore explain why broader attorney-focused mechanisms—including filing-volume designations, continuing consequences based upon prior notice determinations, and a one-sided procedure for challenging notice sufficiency—are reasonably necessary to accomplish the objectives identified in the Initial Statement of Reasons.

The Agency should also identify the statutory authority supporting any consequences that extend beyond the individual notice and affect an attorney's or law firm's future ability to file PAGA notices. General authority to implement PAGA does not, without further explanation, establish why regulation of attorney conduct rather than regulation of notice content is necessary to accomplish the Agency's stated objectives.

Accordingly, Bibiyan Law Group respectfully requests that the Agency reconsider the challenged provisions and adopt a framework more closely directed toward improving the quality of PAGA notices themselves. At a minimum, the Agency should:

1. Eliminate or substantially revise the high-frequency filer designation so that filing volume is not used as a proxy for notice quality;

2. Apply any numerical filing threshold prospectively and exclude amended notices from any filing-volume calculation;

3. Establish affirmative, objective standards describing what constitutes a compliant PAGA notice;

4. Provide a meaningful opportunity to cure an identified deficiency before a notice contributes to a non-compliant filer designation;

5. Substantially revise the employer-response procedure so that it does not become a one-sided adjudication of disputed factual or legal issues, or alternatively provide reciprocal procedures allowing the filer to review, respond to, and rebut evidence upon which the Agency intends to rely; and

6. Explain the statutory authority and necessity for any regulatory consequences directed at attorneys or law firms beyond the particular PAGA notice under review.

///

///

The Agency can improve PAGA notices without creating a broader system of regulation directed at the attorneys who file them. If the objective is better notices, the regulations should provide clearer standards for notices, meaningful opportunities to cure deficiencies, and fair procedures for reviewing them. That approach would more directly advance the Agency's stated objectives while preserving the private enforcement framework the Legislature established.

Sincerely,

BIBIYAN LAW GROUP, P.C.

/s/ David D. Bibiyan

David D. Bibiyan