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California Enacts Sweeping Changes to PAGA

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On July 1, 2024, California Gov. Gavin Newsom signed into law two bills that significantly reform the California Private Attorneys General Act of 2004 (PAGA). California employers will soon benefit from a myriad of reforms that will – among other things – require plaintiffs to establish more stringent standing requirements, implement a reformed penalties structure and improve manageability of claims. These changes will apply to PAGA actions on or after June 19, 2024.

Background

Enacted in 2004, PAGA gives individual employees the right to "stand in the shoes of" the state's attorney general to recover civil penalties on behalf of themselves and other "aggrieved" employees for certain violations of the Labor Code. To bring a claim, employees must first provide written notice to their employer and the Labor and Workforce Development Agency (LWDA) describing the alleged violation. PAGA penalties are steep; they include $100 for each aggrieved employee per pay period for initial violations, and $200 per aggrieved employee for each pay period for subsequent violations. Aggrieved employees may collect 25% of the civil penalties for violations, while the remaining 75% is paid to the LWDA. Plaintiffs' attorneys also are permitted to recover their attorneys' fees and costs, typically at 33% of the total settlement.

As a result of widespread criticism that the law poses excessive penalties and spurs frivolous litigation, a ballot measure slated for the November 2024 election proposed to repeal PAGA and replace it with the Fair Pay and Employer Accountability Act. However, in late June 2024, Newsom reached an agreement with business groups and legislative leadership to avoid this "contentious ballot measure campaign" and instead enact the reform bills **AB 2288** and **SB 92**.

We discuss the major components of the reforms below.

Standing

With limited exception, an aggrieved employee under PAGA must now have "personally suffered" the Labor Code violation for which the plaintiff seeks penalties. This standing requirement is a significant change, as prior courts have permitted plaintiffs broad standing to bring PAGA claims for any Labor Code violation (even a violation they did not personally suffer), as long as they suffered at least one violation. In addition, a PAGA plaintiff must have personally suffered the violation within a one-year statute of limitations period.

Reformed penalties structure

The existing penalties structure is significantly reformed. We highlight some of the major changes below.

1. Reduced penalties

While the reform bills retain the general framework of the $100 penalty for each aggrieved employee, the civil penalty is reduced to

$50 for each employee if the alleged violation "resulted from an isolated, nonrecurring event that did not extend beyond the lesser of 30 consecutive days or four consecutive pay periods." In addition, the $200 civil penalty for "subsequent violations" has been replaced and will be limited to violations where:

- Within the five years preceding the violation, the LWDA or a court issued a finding to the employer that its policy or practice giving rise to the violation was unlawful.
- A court determines that the employer's conduct was "malicious, fraudulent, or oppressive."

In addition, most violations of Section 226, California's wage statement law, will be capped at $25 for each aggrieved employee per pay period if the employee can promptly and easily determine from the wage statement alone the required missing information constituting the technical violation.

2. Caps on penalties for taking reasonable steps

Penalties also will be capped for employers who take reasonable steps to comply with the Labor Code. For example, employers who take proactive steps to comply will have penalties capped at 15% if they take those steps before receiving a PAGA notice, and at 30% if they take those steps after receiving the notice. Such "reasonable steps" may include conducting periodic payroll audits and taking action in response, disseminating lawful written policies, training supervisors on wage order compliance or making a corrective action. Such assessment will be evaluated by the totality of the circumstances considering the employer's size and resources, along with the nature, severity and duration of the violations.

3. Curing violations

Employers who "cure" alleged violations and take reasonable steps to comply may be able to avoid paying penalties. Under the reforms, to "cure" alleged violations of the Labor Code (except with respect to failing to accurately name the employer and state its address on a wage statement and other violations of Section 226(a) relating to wage statements), an employer must correct the violation, be in compliance with the underlying statute and make each aggrieved employee "whole." The reforms provide that an employee is made whole when they receive all unpaid wages owed dating back three years plus 7% interest, liquidated damages if required by the statute and reasonable lodestar attorneys' fees and costs.

4. Derivative penalties prohibited

The reforms also eliminate "derivative" or "stacking of" civil penalties for underlying wage violations, which permitted plaintiffs to seek multiple penalties based on one Labor Code violation. The reforms now provide that plaintiffs cannot collect penalties for violations of Sections 201 – 204 and Section 226 that are in addition to the civil penalty collected for the underlying unpaid wage violation.

5. Share of penalties increased

The share of penalties for aggrieved employees has been increased from 25% to 35%, while the share distributed to the LWDA has been decreased to 65% from 75%.

6. Reduction of penalties for employers paying weekly

To correct the inequity in the law that assessed employers paying on a weekly basis double the amount of penalties than that

assessed of employers paying on a biweekly basis (because penalties were assessed **per pay period**), the reforms provide that penalties will be reduced by one-half for employers whose regular pay period is weekly rather than biweekly or semimonthly.

Early evaluation and resolution procedures

The reforms also provide a robust mechanism with specific deadlines and requirements for early resolution of claims, which depend somewhat on an employer's size during the period covered by the PAGA notice. Under these procedures, employers may file a request for an early evaluation conference once a PAGA lawsuit is filed in court. The request must include a statement about whether the defendant intends to cure any or all of the alleged violations and identify the allegations it disputes. Filing a request pauses the case proceedings. The plaintiff also must submit a confidential statement with the basis for alleged violations, demand for settlement, and the amount of penalties and attorneys' fees and costs claimed, among other things. The court may approve an agreement that the employer has cured the violations as a settlement of the claim.

Beginning October 1, 2024, in addition to the early evaluation conference option above, employers with fewer than 100 employees may submit to the LWDA a confidential proposal to cure one or more of the alleged violations within 33 days of receiving the PAGA notice, and the agency may set a conference with the parties to determine whether the proposed cure is sufficient. Upon completing the cure, the employer must provide a sworn notification to the employee and agency that the cure is completed.

Injunctive relief

Plaintiffs can now seek injunctive relief as an additional remedy, along with civil penalties and attorneys' fees.

Manageability

Earlier this year, the California Supreme Court held in *Estrada v. Royalty Carpet Mills, Inc.*, that trial courts do not have inherent authority to strike (or dismiss with prejudice) a PAGA claim on manageability grounds. The reforms respond to this holding by now authorizing courts with the ability to manage PAGA claims – including by limiting evidence to be presented at trial, limiting the scope of any claim filed to "ensure that the claim can be effectively tried," and consolidating or coordinating actions alleging legally or factually overlapping violations against the same employer.

Next steps

While short of the contemplated repeal, the PAGA reforms will undoubtedly bring in a new era of wage and hour litigation in the Golden State. As the LWDA and court system adapt to this new era, employers should prepare by taking the following steps:

- **Regularly review wage and hour policies and practices, including via regular payroll audits, for compliance with the Labor Code.** This proactive review is especially important now that employers have significant tools in their hands to potentially significantly reduce (if not eliminate) potential PAGA penalties. If any errors are detected, employers should take immediate steps to correct the violations.
- **Train supervisors and managers on Labor Code compliance.** One of the "reasonable steps" to demonstrate compliance in favor of reduction in penalties is training supervisors on wage order compliance. Thus, training appropriate personnel on both employers' wage and hour policies and Labor Code compliance are even more essential in this new PAGA era.
- **Review PAGA notices immediately.** Employers should immediately review any PAGA notices they receive to determine and discuss with counsel whether to take advantage of the reforms' early evaluation and resolution procedures. Promptly reviewing the notices also enables employers to investigate claims of violations earlier and determine how those violations may be cured.

If you have any questions about the PAGA reforms or PAGA more generally, please contact the Cooley employment team.

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