LEGAL UPDATES

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PAGA Reforms: Not a Panacea but Significant Relief for California Employers

Services

Employment Class & Collective Actions

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Professionals

CHENGZHUO HE
KANSAS CITY:
816.983.8364
CHENGZHUO.HE@
HUSCHBLACKWELL.COM

SARAH VINCENT
KANSAS CITY:
816.983.8000
SARAH.VINCENT@
HUSCHBLACKWELL.COM

On July 1, 2024, California Governor Gavin Newsom signed two legislative bills (AB 2288, amending Labor Code Section 2699; and SB 92, amending Section 2699.3) into law, effective July 1, 2024. The new law significantly reforms California's Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2699, *et seq*. (PAGA). Most of these reforms affect PAGA actions brought on or after June 19, 2024, unless the plaintiff submitted a PAGA notice before June 19, 2024.

Background

PAGA, effective January 1, 2004, allows "aggrieved employees" to bring enforcement actions against their employers on behalf of the State of California for alleged violations of the California Labor Code. Successful employees split the penalties with the state: 75% of the penalties to the California Labor and Workforce Development Agency (LWDA) and 25% to the "aggrieved employees."

PAGA authorizes civil penalties against employers based on the number of employees and the number of pay periods during which the Labor Code violations occurred, which can be substantial. PAGA also authorizes attorney's fees for successful plaintiffs.

The California Legislature enacted PAGA to "deputize" current and former "aggrieved employees" as "private attorneys general" to enforce the California Labor Code on behalf of the State of California because the state enforcement agencies, including the Department of Industrial Relations, Division of Labor Standards Enforcement, lacked sufficient resources to pursue such violations. But the business community complained about abuses of the PAGA, including

the extraction of large settlements with employers for technical violations that did not cause any actual damage to an employee. Over the years, PAGA filings have dramatically increased.

Based on PAGA abuses, California voters placed on the November 2024 ballot the California Employee Civil Action Law and PAGA Repeal Initiative, which would have repealed PAGA and replaced it with a new law—California Fair Pay and Employer Accountability Act. This act would have eliminated private PAGA actions and moved the filing process to the LWDA.

On June 18, 2024, California Governor Gavin Newsom, alongside business leaders and legislative leaders, announced a significant agreement to reform PAGA. On June 21, 2024, the legislature introduced two new PAGA reform bills (AB 2288 and SB 92). On June 27, 2024, the legislature unanimously passed the two bills and the sponsors of the PAGA Repeal Initiative withdrew it from the November 2024 ballot. On July 1, 2024, Governor Newsom signed AB 2288 and SB 92 into law, and they took effect immediately.

Key provisions of the PAGA reforms

Key provisions of the PAGA reforms include the following:

1. Standing

The law imposes two new substantive limitations on standing. First, it requires a PAGA plaintiff to have **personally suffered** each of the Labor Code violations that he or she attempts to pursue on behalf of other allegedly aggrieved employees.

Second, the law provides that the PAGA plaintiff must have personally suffered each alleged violation **within one year of filing a PAGA notice** with the LWDA. The law contains an exception to the one-year limitations period for PAGA actions filed by employees represented by certain 501(c)(3) nonprofit legal aid organizations that satisfy the requirements under Section 6213 of the California Business and Professions Code and serve as counsel of record for "aggrieved employees."

2. Limitations on PAGA penalties

The law provides that, subject to certain exceptions, the penalty for a violation is $100 per employee per pay period. Exceptions to this $100 penalty include:

a. **Caps when employer takes "all reasonable steps" to comply**

Previously, PAGA included certain cure provisions allowing the employer to cure the alleged violation by doing all of the following within a short period: (1) abating each violation alleged by any aggrieved employee; (2) complying with the underlying statutes specified in the notice; and (3) making whole

any aggrieved employee. Despite the promise of a cure, it was nearly impossible for employers to cure most violations.

Importantly, the law **expands PAGA's cure provisions and reduces penalties for employers** who proactively take "all reasonable steps" to comply with the Labor Code.

First, if an employer (1) takes "all reasonable steps" to comply with the law, either before or after receiving a PAGA notice, **and** (2) cures an alleged violation, then the employer will not be liable for any penalty for that violation.

Second, if an employer demonstrates that it "has taken all reasonable steps to be in compliance" with the law **prior to receipt** of a PAGA notice or a request for personnel records, the law caps the available penalties at 15% of the penalties sought.

Third, if an employer demonstrates that it "has taken all reasonable steps to prospectively be in compliance" with the law **within 60 days of receiving** a PAGA notice, the law caps the available penalties at 30% of the penalties sought.

Finally, the law limits penalties for wage statement violations to $15 per employee per pay period if an employer fails to take "all reasonable steps" to comply with the law, but nevertheless cures the alleged wage statement violations.

The law also provides examples of "reasonable steps" to comply with the Labor Code, including:

Conducting periodic payroll audits;

Disseminating lawful written policies;

Providing trainings on Labor Code and Wage Order compliance; and

Taking corrective action with regard to supervisors.

An employer's attempts to take reasonable steps will be "evaluated by the totality of the circumstances and take into consideration the size and resources available to the employer, and the nature, severity, and duration of the alleged violations." As such, courts will take into consideration the employer's size and financial condition (and plaintiffs will likely seek discovery on these now expressly relevant subjects). Notably, larger employers are less likely to receive leniency under these conditions.

The law provides that "[t]he existence of a violation, despite the steps taken, is insufficient to establish that an employer failed to take all reasonable steps." This is good news for employers because Labor Code violations alone do not constitute proof of a failure to take all reasonable steps.

b. **Caps for technical violations of wage statement requirements**

The law caps penalties for technical violations of California's wage statement requirements[1] at $25 per employee per pay period if an employee can "promptly and easily determine" the required information from the wage statement despite the alleged error.

In addition, the law caps penalties at $50 per employee per pay period for isolated, nonrecurring errors that last less than 30 days or four consecutive pay periods.

c. **Standard for $200 penalty**

The law clarifies that a court may award the $200 penalty per pay period under two circumstances: first, a court may award the $200 penalty when any agency or court already "issued a finding or determination to the employer that its policy or practice giving rise to the violation was unlawful" within the five years preceding the alleged violation. Second, a court may award the $200 penalty when it finds the employer's conduct was "malicious, fraudulent, or oppressive."

As such, employers who have faced lawsuits for wage and hour violations within the past five years will likely be targeted by plaintiffs' attorneys, even when these cases have been settled or the class certification has been defeated.

Further, the law does not define those terms "malicious, fraudulent, or oppressive." California courts may interpret those terms to have the same meaning as California's general punitive damages statute, California Civil Code § 3294 (defining the terms "malice," "oppression," and "fraud"). It may be appropriate for employers to rely on case law interpreting Civil Code § 3294(a), including constitutional due process protections. It remains unclear whether the same "clear and convincing" evidence standard under Civil Code § 3294(a) will apply to "malicious, fraudulent, or oppressive" violations.

d. **Prohibition on certain "derivative" PAGA penalties**

Currently, PAGA plaintiffs often seek to recover penalties for alleged underpayment of wages and derivative penalties for alleged wage statement violations, failure to pay wages in a timely manner during employment, and failure to pay wages in a timely manner[2] upon termination based on the same underlying underpayment, i.e., so-called "waiting time" penalties.

The law would prohibit an employee from seeking derivative penalties for failure to pay wages in a timely manner unless the underpayment was willful or intentional, and, for wage statement claims, unless the violation was knowing or intentional.

e. **Limitations of potential penalties for employers who pay weekly**

Because PAGA authorizes penalties based on the number of pay periods in which employees suffered a violation, PAGA penalizes employers with weekly payroll schedules twice as much as those employers with bi-weekly payroll schedules.

The law provides relief to these employers by reducing by 50% the penalties if an employee's regular pay period is weekly rather than bi-weekly or semi-monthly.

3. Early resolution procedures

The law also introduces new cure procedures for employers who desire an early resolution. If an employer has less than 100 employees during the one-year PAGA limitations period, then the employer can submit a confidential proposal to the LWDA to cure the alleged violations. The LWDA may then arrange a settlement conference with the plaintiff and the employer to attempt to reach an early resolution. If the LWDA determines that the employer's proposal is not sufficient, or if the LWDA fails to act, then the employee may proceed to file a PAGA action in court.

For employers with more than 100 employees during the PAGA period, the law allows the employer to file a request for a stay of court proceedings and an "early evaluation conference" with the court after filing of a PAGA claim, which requires the court to stay all discovery and responsive pleading deadlines. Once the conference is set, the employer must submit a confidential statement to a "neutral evaluator" that details the disputed allegations, which alleged violations it intends to cure, and the employer's proposed plan to cure the alleged violations. The plaintiff must submit a response statement, including the factual basis for each alleged violation, the amount of penalties claimed for each violation, the total amount of attorney's fees incurred as of the date of the submission, any settlement demand, and the basis for accepting or rejecting the employer's cure proposal. If the neutral evaluator and the parties agree to a proposal and the employer cures the alleged violations, the court treats it as a confidential settlement of that claim.

Unlike the other amendments to PAGA, the early resolution provisions do not become operative until October 1, 2024.

4. Manageability

The law empowers trial courts both to limit evidence at trial and limit the scope of any PAGA claim to ensure an effective trial.

This manageability provision will likely be a source of significant litigation, particularly given that the law does not describe how or when courts should "limit the scope" of a PAGA action.

5. Injunctive relief

The law allows a PAGA plaintiff to seek injunctive relief. However, it remains unclear what specific types of injunctive relief a court may order. Possible injunctions could include measures to enjoin ongoing wage and hour violations, restore unpaid wages, mandate manager training, or require workplace postings.

6. Share of penalty

Under the law, the amount of penalties allocated to aggrieved employees will increase from 25% to 35%.

Issues that may require litigation or another PAGA amendment

The new law contains some arguably undefined and/or ambiguous requirements, including the following:

What kind of "payroll audits" would be sufficient?

How often must an employer conduct "periodic" "payroll audits"?

How to "disseminate" lawful written policies? Depending on the workplace, it may include posting on the company intranet, mass emails to all employees with acknowledgement of receipt, updated policies or employee handbooks sent to all employees, etc.

What kind of "trainings" would be sufficient? Employers may consider providing a one-hour required webinar or live training on the list of litigation risk areas, e.g., meal/rest periods, off-the-clock work strictly prohibited and may result in discipline including termination, properly recording time worked, internal complaint and resolution process, handbook updates with compliant policies, etc.

What kind of "corrective actions" to take with regard to supervisors or when "corrective actions" might be necessary?

What kind of errors are "isolated, nonrecurring"?

Courts will likely interpret and apply these terms in future litigation. It is also possible that the legislature will amend PAGA again to clarify ambiguities.

What this means to you

Under the new law, employers can significantly reduce penalties if they take "all reasonable steps" to comply with the Labor Code, either before or within 60 days of receiving a PAGA notice. Thus, these cure provisions will likely become a significant part of responding to PAGA actions given the potential

for substantial reductions in PAGA penalties. The reforms incentivize employers to be proactive and engage counsel early.

Employers should review their wage and hour practices and policies and provide trainings to maximize compliance with the California Labor Code and Wage Orders. If an employer seeks legal counsel after receiving a PAGA notice, the employer must act within very tight deadlines and conduct the audit process promptly. Employers should pay particular attention to the following high risk Labor Code violations:

Whether employees are provided meal periods as required;

Whether employees are provided rest periods as required;

Whether employees are provided complete and accurate wages statements;

Whether employees are accurately recording their time or are working off the clock;

Whether employees are reimbursed necessary business-related expenses and costs;

Whether employees are timely paid their wages;

Whether nondiscretionary bonuses are included in the calculation of the regular rate of pay; and

Whether wage deductions are lawful.

We also recommend that employers continue to include class or collective action waivers in arbitration agreements to generate a much speedier resolution. However, the California Supreme Court in *Adolph v. Uber Technologies, Inc.* held that plaintiffs do not lose standing to pursue their non-individual PAGA claims once their individual PAGA claims are compelled to arbitration. 14 Cal. 5th 1104 (2023).

Contact us

If you have questions about PAGA reforms, claims, or penalties or other labor and employment matters, please contact Tyler Paetkau, Sarah George, Chengzhuo He, or your Husch Blackwell attorney.

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[1] *See* Cal. Lab. Code § 206(a) (requiring the wage statement to include, among other information, (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions,

(5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and the last four digits of his or her Social Security number or an employee identification number other than a Social Security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee).

[2] *See* Cal. Lab. Code § 203 (on the same day in case of involuntary termination and within 72 hours in case of resignation).