

Details on PAGA Compromise Bill; Benefit to Employers To Be Determined

JULY 30, 2024

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As we reported here, California lawmakers recently came to terms on a PAGA replacement bill. While this law was touted as a grand compromise intended to benefit both employees and employers, its effectiveness in reducing the costs associated with defending PAGA suits remains uncertain and will depend partly on the California judicial system's ability to implement many of the law's provisions. The provisions of AB2288 amending PAGA apply to civil actions filed (or based on notices filed) on or after June 19, 2024.

Changes to Damages

AB2288 adds a provision permitting an employee to obtain injunctive relief against an Employer and increases the share of PAGA penalties that employees keep from 25% to 35%.

Standing

AB2288 also tightens the "standing requirement" for PAGA claims by requiring that an employee must demonstrate they personally experienced each specific Labor Code violation cited in the claim. The new legislation also specifies that a claim is not timely unless the employee experienced the violation in the one-year period applicable to PAGA claims.

Reduced Penalties

Employers taking all reasonable steps, such as periodic payroll audits, disseminating lawful policies, training supervisors or taking corrective action prior to receiving a PAGA notice or a request for personnel records, can reduce penalties by 85%. If all reasonable steps are taken within 60 days of receipt of a PAGA notice, the penalty is reduced by 70%. Employers that "cure" but don't take all reasonable steps to comply with the law will have penalties capped at \$15 per pay period.

Historically, each PAGA violation could trigger a \$100 penalty, with each subsequent violation accompanied by a \$200 penalty. Now, civil penalties are \$100 per employee per pay period, with two exceptions. First, if the violation is related to an unlawful wage statement, the penalty is only \$25 per employee per pay period, provided the employee could quickly and easily determine the accurate information from the wage statement or would not be confused or misled about the employer's identity. Second, a penalty of \$50 per employee per pay period if the violation resulted from a non-recurring event lasting no more than 30 consecutive days or four consecutive pay periods. The civil penalty could increase to \$200 if, within five years prior to the violation, there was a finding or determination that the employer's policy or practice was unlawful or that the employer's conduct was malicious, fraudulent, or oppressive.

The new legislation also codifies *Naranjo v. Spectrum Sec. Services, Inc.* to eliminate PAGA penalties where there is a good faith dispute regarding (1) failure to pay all wages due and owing upon separation (i.e., “waiting time penalties”), (2) failure to timely pay wages, and (3) wage statement violations that were not willful or intentional but not where a wage statement was not provided at all.

Moving forward, double recovery of derivative penalties under various sections of the Labor Code is also limited. Under the new legislation, civil penalties will not be recoverable for violations of Labor Code sections 201, 202, and 203, for non-willful or unintentional violations of section 204, or for non-knowing or unintentional violations of section 226, including failures to provide a wage statement that are separate from the civil penalty collected for the underlying unpaid wage violation.

In another effort to cap or limit penalties, employers who pay weekly will not be subject to “double penalties” relative to employees who pay bi-weekly. Now, penalties are reduced by 50% for employers who pay weekly.

Ability to Cure

If employers cure applicable violations by correcting the underlying conduct causing the violations in the PAGA notice and make employees whole, they can avoid PAGA penalties. Employers can cure failures to provide meal periods and rest breaks, minimum wage violations, overtime violations, expense reimbursements, and wage statement violations. To make employees whole, employers must pay an amount sufficient to cover any unpaid wages from the past three years, add 7% interest, pay any statutorily required liquidated damages, and pay attorneys’ fees and costs.

Of note, the new PAGA law also allows for a “cure plan” process. Beginning on October 1, 2024, employers with less than 100 employees have 33 days to cure the alleged violations from the date of the PAGA notice by submitting a confidential proposal to the LWDA describing a plan to cure the alleged violations. The LWDA may determine the plan is sufficient, identify additional information necessary, and set a deadline to complete the cure. On the other hand, the LWDA could determine the plan is insufficient, which would permit a PAGA plaintiff to sue after 65 calendar days.

Employers who employ at least 100 employees may file a request for an early evaluation conference and stay of proceedings after being served with a summons and complaint. This process is unique to PAGA and provides an opportunity for neutral parties to assess the dispute early in the litigation. The law gives courts the discretion to determine who will conduct the conference and how the process will operate. According to the law, the “neutral party” who assesses the dispute may be a judge, commissioner, or any other person knowledgeable about and experienced with the Labor Code. We anticipate that jurisdictions like Los Angeles County and others that handle the bulk of PAGA suits will establish efficient early evaluation programs, but questions remain as to how counties with smaller courts will implement this new PAGA provision.

Takeaways

While employers should remain hopeful that the new PAGA law will reduce the costs historically associated with defending PAGA suits, we anticipate that plaintiffs’ firms will continue to find ways to ensure PAGA remains a viable option to put pressure on employers. Because PAGA cases will continue to be filed, we highly recommend that employers contact employment counsel in an effort

to review their obligations under the Labor Code and how best to defend future claims under the new PAGA law.

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