California's PAGA Reform: What Employers Need To Know

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On July 1, 2024, Governor Gavin Newsom signed into law major changes to California's Private Attorneys General Act (PAGA). While short of a full repeal, AB 2288 and its counterpart, SB 92, contain numerous provisions that will benefit California employers, including more stringent standing requirements and a reformed penalties structure, as well as several other changes summarized below. These changes apply to PAGA actions filed on or after June 19, 2024.

Background

Enacted in 2004, the PAGA authorizes aggrieved employees to bring actions seeking civil penalties for violations of the California Labor Code on behalf of themselves, other employees and the State of California.

More Stringent Standing

Under prior law, plaintiffs had broad standing to bring PAGA claims on behalf of themselves and other employees for any alleged Labor Code violation — even a violation they did not personally suffer — as long as they suffered at least one violation themselves. With limited exception, plaintiffs now must have "personally suffered each of the violations alleged" during the applicable one-year statute of limitations in order to have standing to pursue litigation under PAGA.

Empowering Courts to Manage PAGA Claims

In early 2024, the California Supreme Court held that trial courts lack inherent authority to strike or dismiss PAGA claims on "manageability" grounds. While the new PAGA statute did not overrule this authority, it does authorize courts to limit evidence presented at trial or limit the scope of any PAGA claim to ensure that the claim can be effectively tried.

Changes to PAGA Penalties

PAGA previously provided for a civil penalty of $100 for each aggrieved employee per pay period for an initial Labor Code violation and $200 for each aggrieved employee per pay period for each subsequent violation. AB 2288 removes the premise of an "initial violation," modifies the penalty scheme to encourage employers to cure or fix any Labor Code violations and reduces the amount of penalties that may be imposed. Penalties now range from $25 to $200, depending on the kind of violation. For example, a $25 penalty may apply for certain wage statement violations, while a $200 penalty may apply for more egregious violations (such as violations where the conduct was malicious, fraudulent or oppressive).

Penalty Reductions and Caps

The new reforms provide for a reduction of civil penalties in certain circumstances.

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- *Fifteen Percent Penalty Cap for Efforts to Cure Prior to Dispute Arising*: For employers who have taken "all reasonable steps" to comply with the Labor Code before receiving a PAGA notice or records request from an employee, the available penalty will be capped at 15 percent of the applicable penalty.
- *Thirty Percent Penalty Cap for Efforts to Cure Following Receipt of a PAGA Notice*: For employers who, within 60 days of receiving a PAGA notice, take "all reasonable steps" to comply with the noticed Labor Code violations, the penalty will be capped at no more than 30 percent of the applicable penalty.

Employers who have taken "reasonable steps" and "cured" the violations will not be required to pay a civil penalty for those violations. In all other circumstances, employers who have not taken "reasonable steps" but have "cured" the violation will pay a civil penalty of no more than $15 per employee per pay period during the applicable statute of limitations period.

"All reasonable steps" includes, but is not limited to:

- Conducting periodic payroll audits and taking action in response to the results of the audit;
- Disseminating lawful written policies;
- Training supervisors on applicable Labor Code and wage order compliance; and/or
- Taking appropriate corrective action with regard to supervisors.

Whether the employer took reasonable steps is evaluated by the totality of the circumstances and takes into consideration the size and resources available to the employer, and the nature, severity and duration of the alleged violations. Notably, the existence of a violation, despite the steps taken, is insufficient to establish that an employer failed to take all reasonable steps.

No Stacking of Derivative Penalties

The new amendments limit aggrieved employees from combining and stacking penalties, specifically penalties for violations of Labor Code Sections 201 (timing of payment of wages), 202 (late payment of wages), 203 (unpaid wages for employees who are terminated or resign), 204 (timing requirements for payment of wages where the violation is neither willful nor intentional) and 226 (wage statements, where the violation is neither knowing or intentional nor a failure to provide a wage statement). This change effectively precludes employees from collecting multiple penalties for the same underlying wage violation.

Curing Violations and Making Employees Whole May Avoid PAGA Litigation

Employers can seek to cure more Labor Code violations under the new PAGA statute, including for alleged failure to provide meal and rest periods, overtime violations and failure to properly reimburse business expenses.

Part of "curing" an alleged violation is that the employee be "made whole." This requires the employer to pay the employee (1) an amount sufficient to recover any owed unpaid wages due dating back three years; (2) pay 7 percent interest; (3) pay any liquidated damages required by statute and (4) pay reasonable attorney's fees and costs.

Cure Procedures for Small and Large Employers

PAGA now establishes optional procedures for small and larger employers to cure alleged violations, which take effect on Oct. 1, 2024.

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- *Employers with Fewer Than 100 Employees*: Within 33 days of receipt of a PAGA notice, smaller employers may submit to the Labor Workforce Development Agency (LWDA) a confidential proposal to cure the alleged violations. The PAGA reforms then provide for a multi-step review process with the LWDA, which may include a conference with the parties to determine whether the proposed cure is sufficient and the deadline agreed upon by the parties for the employer to complete the cure. If the LWDA determines that the alleged violation has been cured, the employee may not proceed with a civil action. *Id.*
- *Employers with at Least 100 Employees*: Once served with a summons and complaint, these employers may file a request for an early evaluation conference and a request for a stay of court proceedings to pause all discovery and responsive pleading deadlines. The PAGA reforms provide for a multi-step process, which may include the employer proposing a plan to cure the alleged violations to be reviewed and supervised by a neutral evaluator and filing a motion for the court to approve the plan.

Change to Distribution to LWDA

PAGA previously distributed any award under PAGA as 25 percent to the employees and 75 percent to the LWDA. The new amendments increase the share of the PAGA penalty to employees from 25 to 35 percent and decrease the share to the LWDA from 75 to 65 percent.

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While short of a full repeal, these PAGA reforms should incentivize and reward employers that make good-faith, reasonable efforts to cure violations and comply with the California Labor Code. That said, the new PAGA rules are ambiguous in many respects, which is sure to spurn litigation by plaintiffs challenging the new statute, including the cure processes.

In the meantime, employers should be regularly conducting audits of their wage and hour policies and practices, training supervisors and management on Labor Code compliance and timely reviewing PAGA notices with legal counsel so that they can investigate claims of violations earlier and determine if and how those violations may be cured.

Please contact your Haynes Boone attorney if you have any questions or need guidance on the new PAGA reforms.

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