



Client Alerts

California Compliant: At Last! Negotiated Reform of California's "Job-Killing" Private Attorneys General Act

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Since its enactment more than 20 years ago, California's Private Attorneys General Act (PAGA) has been decried by employers as a "job-killer" because of its substantial negative impact on the cost of doing business in the state. PAGA permits workers to sue their employers as deputized agents of the state to recover civil penalties for Labor Code violations. To promote enforcement of wage and hour laws, PAGA lets current or former employees sue for themselves and on behalf of other "aggrieved employees" whose rights were violated. The state's Labor and Workforce Development Agency (LWDA) receives 75% of PAGA penalties; only 25% is distributed among the affected employees.

Dozens of industry groups, including the California Chamber of Commerce, have supported a ballot initiative that would repeal and replace PAGA. The measure qualified for the November 5, 2024, election – effectively giving California voters control over the controversial legislation. The looming uncertainty about PAGA's fate apparently was too much for the various stakeholders; Governor Newsom recently announced that worker advocates, industry groups, and state legislators reached an agreement to give PAGA a reboot through legislative reforms. The pact trades withdrawal of the ballot initiative in exchange for enactment of negotiated provisions.

The Bargain – Legislative Reform of PAGA

The deal hinges on two pieces of proposed legislation becoming law. Each bill includes a fail-safe, so it would only become effective if the other one does, also. Assembly Bill 2288 and Senate Bill 92 (the PAGA Reforms) would amend Labor Code Sections 2699, 2699.3, and 2699.5. On June 27th, both houses of the legislature passed the bills, which have been presented to the Governor for his approval. He is expected to sign both measures.

Each bill has been designated as an "urgency statute," which would "go into effect immediately." (The ballot initiative is cited as support for the urgency clauses.) Still, the PAGA Reforms would be implemented in phases; for example, some changes would not go into effect until October 1, 2024.

Wins for Employers

From an employer's perspective, the best "reform" of PAGA would have been a complete repeal of the Act. Noting that workers receive only a small fraction of the gross amounts spent by employers because of PAGA lawsuits, some commentators have joked that the Act's acronym stands for "Prettypmuch All Goes to the Attorneys." Although the proposed legislation would not *level* the playing field, it would tip the balance closer to employers, at least in some respects.

PAGA Reforms Would Narrow the Scope of Claims that May be Asserted.

With the Governor's signature, the PAGA Reforms would significantly limit the scope of a plaintiff's authority as a deputized representative acting on behalf of the state. A PAGA plaintiff would be empowered to represent others only with respect to the same type of violation(s) that the plaintiff personally suffered (currently, a PAGA plaintiff can assert claims based on a variety of violations that employees experienced, so long as the plaintiff suffered at least *one* of those violations). Amended Section 2699 would restrict the plaintiff's power to assert representative claims only "on behalf of ... other current or former employees *against whom a violation of the same provision was committed.*"

The amendments also would incorporate the one-year statute of limitations provided by Code of Civil Procedure Section 340. Only an "aggrieved employee" can recover PAGA penalties based on violations suffered by others. The PAGA Reforms would revise the definition of an aggrieved employee. As amended, an aggrieved employee would be required to have "personally suffered each of the violations alleged during the" limitations period.

The Reforms Would Facilitate Earlier Resolution of PAGA Claims.

PAGA claims are the stuff of nightmares for employers not only because of the potential penalties but also because of the time and expense required to resolve such suits. Businesses pay for their own counsel to defend the claims, and may be hit with an award of attorneys' fees incurred by the PAGA plaintiff's lawyer, if the plaintiff prevails. The California Chamber of Commerce reports that the average amount paid to the *plaintiff's* attorney in a PAGA action exceeds \$370,000. Except in rare cases, the litigation continues for many months or even years. Mediation (which itself is expensive – typically six figures) is frequently required to bring the parties closer together. If the parties ultimately reach an agreement for the employer to make a settlement payment, both sides still must go through a tedious process of submissions to the LWDA and the court to seek approval for the deal they struck.

Early Evaluation Conferences

The PAGA Reforms would provide some measure of relief in terms of the available mechanisms to bring litigation to a close. Employers would be permitted to request an early evaluation conference and stay of the action. The request could be filed before or with the employer's response to the complaint. Except on a showing of good cause to deny the employer's request, the court would stay the proceedings and order the parties to attend an evaluation conference within 70 days. Early evaluation conferences would be conducted by a judge, commissioner, or other knowledgeable person designated by the court. Each side would submit a confidential position statement, including with respect to any proposal by the employer to cure the alleged violation(s). Written submissions for, communications during, and evidence submitted in connection with the early evaluation conference would be protected as confidential pursuant to Evidence Code Section 1152.

If the neutral evaluator accepts the employer's proposed cure, the employer would be required to prove that it did so. If no issues remained in dispute, the parties would notify the court, which would treat their submission as a proposed settlement. (The PAGA Reforms would not affect the existing requirement that a court review and approve a proposed settlement.) If the neutral or the plaintiff disagrees with the employer's proposed cure, the employer could file a motion asking the court to approve the cure. In ruling on the motion, the court could receive evidence and request briefing from the parties.

Employers having 100 or more employees could benefit from the new early evaluation conference procedures immediately, if the Governor approves both measures. Early evaluation conferences would not be available to smaller employers until October 1st, but the PAGA Reforms would give such businesses an additional *pre-litigation* opportunity to resolve PAGA claims.

LWDA Settlement Conference/Hearing (for Employers with Fewer than 100 Employees)

A PAGA claim cannot be asserted in a civil action unless the employee seeking to act as a PAGA plaintiff has given notice of the alleged violations to the employer and the LWDA. The PAGA Reforms would allow employers having fewer than 100 workers to submit a "confidential proposal to cure one or more of the alleged violations" to the LWDA within 33 days of the employer's receipt of the PAGA notice. If the agency believes the employer's proposed cure is sufficient, or wants more information from the parties, it could hold a settlement conference. If the agency makes a preliminary determination that the alleged violation has been cured, but the employee disagrees, the LWDA would set a hearing. For employers, a hearing would be an important opportunity because a finding that the employer cured the violation(s) would deprive the employee of the right to file a lawsuit; the employee's only recourse would be to appeal the finding to the superior court. But the employee still could file a lawsuit if the agency determines, either during the conference or following a hearing, that the employer's proposed cure is inadequate.



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An employer's cure or proposal to cure alleged violation(s), if made to the LWDA in connection with either a settlement conference or a hearing, would not be deemed an admission of liability, and instead would be treated as settlement communications protected by Evidence Code Section 1152.

The Reforms Would Reduce The Amount of Penalties In Some Cases.

Until now, PAGA's "default" penalties (applicable to violations for which no specific penalty is provided by another statute) have been: \$100 "for each aggrieved employee per pay period for the initial violation"; and \$200 "for each aggrieved employee per pay period for each subsequent violation." The amendments offer employers hope for multiple reasons:

- Lesser penalties would apply in some cases. PAGA's "default" penalty would remain \$100, but the amendments would add exceptions. For example, the penalty for certain deficiencies with respect to wage statements would only be \$25 per violation.
- The heightened penalty of \$200 would not be triggered by a "subsequent" violation. The amendments to PAGA scrap the term "subsequent violation." Instead, the steeper penalty of \$200 (per violation) would apply only if: a) the agency or a court had previously determined, within five years prior to the alleged violation, that the employer's policy or practice giving rise to the violation was unlawful; or b) a court finds that the employer acted maliciously, fraudulently, or oppressively (akin to the standard for punitive damages, generally).
- Employers who take "reasonable steps to be in compliance" might have less exposure. Some PAGA penalties could be capped (at either 15% or 30% of the penalty sought, depending on the circumstances) if an employer's conduct was "reasonable" under "the totality of the circumstances," considering "the size and resources available the employer, and the nature, severity and duration of the alleged violations." As amended, Section 2699 would provide that an employer's reasonable steps include, but are not limited to:
 - implementing facially compliant policies;
 - training supervisors on wage and hour requirements;
 - conducting payroll audits and taking appropriate actions based on the results; and
 - coaching supervisors, as needed.

The PAGA Reforms also would correct a perceived injustice to employers who pay their workers more frequently than required. Calculating PAGA penalties on a "per pay period" basis doubled the liability of establishments paying workers weekly, as opposed to every two weeks. The PAGA Reforms would remedy this inequality by adding a provision that reduces penalties by 50% "if the employees' regular pay period is weekly rather than biweekly or semimonthly."

The Reforms Would Grant Courts Authority to Limit Evidence or Claims.

Earlier this year, the California Supreme Court addressed conflicting decisions by the state's Courts of Appeal regarding a trial court's authority to dismiss (or trim) PAGA claims when it finds that it would be "unmanageable" to resolve all of them together. In *Estrada v. Royalty Carpet Mills*, the high court distinguished PAGA claims from those asserted as a traditional class action, and on that basis decided that "class claims differ significantly from PAGA claims in ways that make it inappropriate to impose a class action-based manageability requirement on PAGA actions." The court noted that PAGA "lacks a manageability requirement" anywhere in its text.

The proposed legislation responds directly to the *Estrada* decision. Section 2699 would include new language explicitly confirming a trial court's authority to "limit the evidence to be presented at trial or [to] otherwise limit the scope of any claim ... to ensure that the claim can be effectively tried." Revival of "manageability" as an issue would be a win for employers. PAGA claims based on alleged failures to provide compliant meal and rest breaks may be particularly susceptible to such challenges.



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Other Proposed Changes to PAGA

The amended statutes would add guidance about how to calculate the amount an employer must pay aggrieved employees to "cure" a violation. Currently, PAGA provides that an employer can "correct" some violations by making employee(s) "whole." The proposed legislation adds that "[a]n employee who is owed wages is made whole when the employee has received an amount sufficient to recover any owed unpaid wages due under the underlying statutes specified in the notice dating back three years from the date of the notice, plus 7 percent interest, any liquidated damages as required by statute, and reasonable lodestar attorney's fees and costs to be determined by the agency or the court." Amended Section 2699 also would allow employers to "cure" alleged violations by paying an amount that "could reasonably be owed" to the aggrieved employees based on the alleged violations, where the amount is disputed.

The PAGA Reforms would adjust the allocation of penalties as between the LWDA and employees; instead of a 75/25 split, 65% would be awarded to the LWDA and the other 35% distributed to employees.

Takeaways for Employers

Employers have many incentives to hedge against the risk of a dreaded PAGA lawsuit. Minimizing a company's legal exposure starts with taking proactive steps to ensure its compliance with California's complex wage and hour laws. That should involve careful drafting of policies, training for human resources personnel and supervisors, and regular audits of payroll practices (including wage statements). Employers who do so should fare better under the PAGA Reforms because of the opportunity to show that only reduced penalties (if any) are warranted.

The new option for employers to request an early evaluation conference also rewards employers who promptly investigate and prepare their defense when they learn that a PAGA lawsuit may be imminent. When current or former employees request copies of their employment records – which may happen long before the company receives a formal PAGA notice – employers should review those documents carefully to evaluate whether violations may have occurred and if so, how they might be cured. Whether or not it has previously responded to a records request, an employer who receives a PAGA notice also should immediately review employment records so that the company can: 1) cure any violation(s) that may have occurred; and 2) take whatever steps may be appropriate to prospectively be in compliance with California law, with the aim of qualifying for capped penalties.

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