PAGA Reform: What To Know And Do To Protect Your Organization

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- Submit questions through the Q&A function.
- Keep questions relevant to the current topic.
- Webinar runs from 10 a.m. to 11 a.m.
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- Have fun!

Agenda

- PAGA Basics.
- New Penalty Caps.
- Right to Cure and New Litigation Rules.
- A Walk in the (PAGA) Park.

PAGA Basics

What Is PAGA?

- PAGA — the Private Attorneys General Act — was enacted in 2004 to allow individual workers to bring class-action-like claims against employers for monetary penalties due to Labor Code violations (that otherwise would be adjudicated only on an individual basis with the Labor Commissioner).
- Most PAGA actions are rooted in a handful of Labor Code violations; however, dozens of Labor Code violations may be the basis of a PAGA claim — and nearly all are wage and hour issues.
- PAGA actions are often brought in conjunction with other class action claims for unpaid wages related to overtime, minimum wage, and meal and rest break premiums.

Most Common PAGA Triggers … And A New One

- Wage statements (Labor Code section 226).
- Misclassification of employees (Labor Code section 515).
- Unpaid wages/minimum wage violations (Labor Code section 1194).
- Meal and rest break violations (Labor Code section 512).
- Unpaid or improperly paid overtime (Labor Code section 510).
- Expense reimbursements (Labor Code section 2802).
- Untimely payment of wages during employment and at termination (Labor Code sections 202, 203 and 204).
- Paid sick leave violations (Labor Code section 245, *et seq.* added through *Wood v. Kaiser Foundation Hospitals,* 88. Cal.App.5th 742 (2023).

Special Notes On Wage Statements

- Wage statements make up a substantial amount of PAGA actions filed each year.
- Labor Code section 226(a) sets forth specific information that must be on all wage statements:
  - Gross wages, all deductions from gross wages, and net wages.
  - Any meal and rest period premiums in the pay period.
  - Hours worked in the pay period, the pay period's dates, and all rates at which wages were earned.
  - Name of the employee and either last four of their Social Security number or some other identification number.
  - Full name and address of employer or legal entity that is the employer.
  - Certain additional information for piece rate and temporary staffing agency employees.
- Failure to include this required information may trigger a PAGA claim.

PAGA Penalty Structure

- An aggrieved employee who brings an action under PAGA may recover the penalties identified in the specific Labor Code provision.
- For example, wage statement violations allow for $50 for the initial violation and $100 for each subsequent violation capped at $4,000 per employee.
- If a Labor Code provision doesn't have a specific civil penalty (e.g., meal and rest breaks), then PAGA provides the penalty amount.
- The penalties received are split between the employees and the Labor and Workforce Development Agency (LWDA).

How A PAGA Action Begins

- A prospective PAGA action starts with a notice of violations with supporting facts that is sent to both the employer and the LWDA.
- The LWDA can decide whether to investigate the claims. If it does, it will notify the parties within 60 days of the employee's notice.
- If the LWDA chooses not to investigate, an employee may file suit upon notice from the LWDA or after 65 days from the postmark of the employee's notice if the LWDA remains silent. Then, litigation is on!
- The LWDA investigates very few claims relative to those filed, greatly increasing litigation under PAGA.

The Reform

- Over the past 20 years, PAGA has turned into a litigation-first model that largely benefits attorneys, offers very little relief for employees, and results in exorbitant costs for employers. This is why we have the reform, which:
  - Greatly expands right to cure violations alleged in the LWDA notice, giving employers the chance to end litigation before it starts.
  - Provides employers with incentives to proactively and reactively take reasonable steps to remedy wage and hours issues to substantially reduce penalties.
  - Created unique mechanisms for small and large businesses to prevent or delay litigation.
  - Took effect for any notices filed on or after **June 19, 2024**.

New Penalty Caps

New Penalty Structure

- The law retains the existing penalties in other code sections, with the exception of wage statement penalties under certain circumstances. More on that in a minute!
- The law now reduces the default penalty structure for those Labor Code violations without specified penalties to $50, $100 or $200 depending upon circumstances.
- The penalties are now split more in favor of the employees with 35 percent going to the employees and the remaining 65 percent to the LWDA.

Usual Penalties

- The minimum penalty under PAGA is now **$50**.
- This penalty will apply per aggrieved employee per pay period if the violation resulted from an **isolated, nonrecurring event** that did not extend beyond the lesser of **30 consecutive days** or **four pay periods**.
- For example, an employer that institutes a one-time production bonus for a month may miscalculate the regular rate of pay for overtime. If this happens, and the miscalculation isn't recurring, it will be subject to this minimum penalty.
- In other **ordinary** cases, the penalty will be **$100** per aggrieved employee per pay period.

Aggravated Penalties

- The penalty amount increases to **$200** per aggrieved employee per pay period if either of the following occurred:
  - Within five years preceding the alleged violation, the LWDA or any court **issued a decision** to the employer that the practice giving rise to the violation was unlawful.
  - The court determines that the employer's conduct was **malicious, fraudulent or oppressive**.
- For example, if an employer rounded meal periods and lost a claim on that basis, and the new alleged violation was also related to meal period rounding, this would trigger aggravated penalties.

Special Wage Statement Penalties

- For all Labor Code section 226 wage statement violations, the penalty is **$25** if:
  - The accurate information could be determined on the wage statement; or
  - In the case of the employer's name and address, the employee was not confused or misled by the entry on the wage statement.
- Otherwise, if the accurate information could not be determined by the wage statement alone or there was no wage statement provided at all, the penalty reverts to the standard penalty under Labor Code section 226.

Limiting Penalties

- If the employer takes "**all reasonable steps**" either prior to receiving a personnel records request or PAGA notice, or within 60 days of receiving a PAGA notice, the employer will only be subject to 15 or 30 percent of the penalties, respectively — even if a violation is found!
- "All reasonable steps" will depend upon the totality of the circumstances, including size of, and resources available to, the employer, as well as the nature, severity and duration of the violations.

“Reasonable Steps”

- Although non-exhaustive, the reform identifies some steps that may be reasonable steps:
  - Conducting periodic **payroll audits** or, in the case of a notice, a specific audit of the practice(s) that gave rise to the alleged violation(s).
  - Disseminating lawful written **policies**.
  - **Training** supervisors on applicable Labor Code and Wage Order compliance.
  - **Disciplining** supervisors for failing to comply with the policies and training.

Payroll Audits

- Payroll audits are highly effective (but complex) measures to help prevent and correct any wage and hour issues, as well as help devise those lawful written policies.
- Payroll audits will cover a wide variety of practices including, but not limited to:
  - Proper exempt/nonexempt classification.
  - Paying all nonexempt employees for all hours worked.
  - Calculating and appropriately paying the regular rate of pay for overtime, reporting time pay, meal and rest break premiums, and paid sick leave.
  - Ensuring meal and rest break compliance.
  - Providing and paying paid sick leave appropriately.
  - Timely issuing all final wages.
- You must audit third-party providers, like payroll services, as you are ultimately liable for their work.

Lawful Written Policies

- There are a substantial number of policies that an employer may now add to their employee handbook or issue separately relating to wage and hour compliance, including but not limited to:
  - Overtime pay.
  - Meal and rest breaks.
  - Makeup time.
  - Timekeeping and off-the-clock work.
  - Expense reimbursement.
  - On-call or standby work.
- No matter the restrictive language you put in policies — for example, no overtime work without permission, or mandatory meal/rest break timing — if a violation occurs, you pay the overtime or the premium. Then, discipline the employee.
- Consider disseminating these sets of policies annually and obtaining separate acknowledgements for these policies.

Supervisors

- Supervisors can be both the cause of, and front-line defense against, all forms of employment liability, including in wage and hour matters.
- Supervisors must undergo training on your compliant wage and hour practices, especially in very sensitive areas within their control, such as meal and rest break compliance, off-the-clock work, and reporting time pay.
- Supervisors must also be held strictly accountable for violations of your policies.
- For example, if you discover that a supervisor is allowing leniency around the duration and timing of meal and rest breaks in violation of your policy, you must discipline the supervisor to take advantage of the "reasonable steps" penalty deductions.

Right To Cure And New Litigation Rules

Right To Cure

- "Curing" a violation means that the employer:
    - Corrects the violations alleged;
    - Is in compliance with the underlying Labor Code statutes (e.g., meal and rest break or unpaid/improperly paid overtime) specified in the PAGA notice; and
    - Ensures each aggrieved employee is made whole by paying:
        - Any owed unpaid wages due under the underlying statutes dating back three years;
        - 7 percent interest on the unpaid wages;
        - Liquidated damages as required by statute (e.g., minimum wage violations); and
        - Reasonable attorneys' fees and costs determined by the LWDA or the courts.
- **An employer that has taken "all reasonable steps" and chosen to "cure" the alleged violations is not subject to any PAGA penalties.**
- If the employer didn't take "all reasonable steps" but chose to cure the violations, the penalties are capped at $15 per employee per pay period.

Curing Process For Small Businesses

- A small business is defined as one that employed **fewer than 100 employees** total during the period covered by the PAGA notice.
- Small businesses, if they wish to cure some, or all, of the violations, may submit to the LWDA a confidential proposal of how they will cure.
- This proposal must be submitted online and to the employee's representative within **33 days** of receipt of the PAGA notice.
- So, if you receive a PAGA notice, drop what you are doing, contact counsel, determine whether there are any "reasonable steps" you need to take, and then determine whether you will cure any violations.

Curing Process For Large Businesses

- A large business is defined as one that employed **at least 100 employees** in total during the period covered by the PAGA notice.
- Large businesses may attempt to cure upon receipt of the PAGA lawsuit by requesting an early evaluation conference before litigation continues.
- Although large businesses must wait for a full-fledged lawsuit to take advantage of early cure processes, the receipt of the PAGA notice should still spur a large business to evaluate “all reasonable steps” it may take to address the alleged violations as necessary to take advantage of the reduction of penalties to 30 percent of full value.

Curing Wage Statement Violations

- If the PAGA notice alleges violations under Labor Code section 226, the employer can cure the violations by taking one of two actions:
  - If the violation relates to the name and address of the employer's legal entity, then the employer may cure the violation by providing a summary form to all aggrieved employees that includes correct information for all pay periods for which there was a violation.
  - For all other wage statement violations, the employer may cure by providing complete, accurate wage statements to all aggrieved employees for each pay period in which a violation occurred in the three years preceding the PAGA notice.
    - If you utilize electronic paystubs, you may make these updated wage statements available digitally as long as the aggrieved employees have reasonable access.
- Within **33 days** of the PAGA notice's postmark date, the employer must file a notice with the LWDA that the cure has been completed.

A Walk In The (PAGA) Park

Three Seasons Camping Supplies

- Three Seasons Camping Supplies (Three Seasons) manufactures camping equipment and sells it to consumers. The company regularly employs well over 100 workers.
- After attending this webinar, Three Seasons' human resources group begins to plan proactive steps to prevent and mitigate PAGA claims.
- Unfortunately, before they get started, they received a PAGA notice from an aggrieved employee.

The PAGA Notice

- The notice alleges several violations that have occurred over the previous three years:
  - Assistant managers are misclassified as exempt (Labor Code section 515) along with all the other wage and hour issues that arises with misclassification.
  - Nonexempt workers in manufacturing are not provided compliant meal breaks (Labor Code section 512).
  - Failure to pay regular rate of pay for overtime to retail staff members that earn commissions (Labor Code section 510).
  - Wage statement violations related to the above violations (Labor Code section 226).
- What steps are next for Three Seasons?

Investigation (Audit) Into Allegations

- First, upon notice, inform legal counsel and begin an investigation into the violations to determine what is and isn't a potential violation.
- During the investigation, Three Seasons finds the following:
  - Assistant managers in retail stores are summarily classified as executive exempt employees because they supervise the staff in the store. However, their actual job duties sometimes entail more nonexempt work than exempt work.
  - Nonexempt workers in manufacturing are directed by supervisors to take their meal breaks whenever workflow allows it, even more than five hours into their eight-hour shift.
  - Three Seasons' third-party payroll provider has not been including earned commissions in each pay period to the regular rate of pay for nonexempt retail employees.

Corrective Reasonable Steps

- Next, after determining that there are potential violations in all of the allegations, Three Seasons may still limit penalties by taking corrective reasonable steps, including:
  - All assistant managers are now classified as nonexempt and all hiring managers and other staff that determine exemption for a position must do so on an individual basis.
  - Supervisors are trained/retrained on California's meal and rest break rules. All relevant supervisors are given disciplinary warnings about prior noncompliant meal break practices.
  - All employees receive and acknowledge review of Three Seasons' meal and rest break policy.
  - Three Seasons works to resolve the payroll company regular rate of pay calculation issue for retail employees who earn commissions.

To Cure Or Not To Cure

- Because Three Seasons is a large employer for cure purposes, it cannot cure until a lawsuit is filed.
- In the interim, Three Seasons should work with legal counsel before any lawsuit is filed to conduct a damages audit of how much it would cost to cure some or all of the violations.
- Depending on the values, there may be some economic benefit to curing some or even all violations because of the elimination of PAGA penalties and reduction in litigation costs.
- Without curing, if Three Seasons follows through on "all reasonable steps," it has successfully reduced penalties to 30 percent of the full value.

Be PAGA Prepared

- To assist employers with taking "all reasonable steps," CalChamber has created a PAGA Wage & Hour Compliance Toolkit that includes:
  - Access to two additional 90-minute webinars covering wage and hour issues for both nonexempt and exempt employees.
  - 16 wage and hour written policies in both English and Spanish.
  - Over 40 forms, including a payroll audit checklist; forms employers give to employees are in both English and Spanish.
  - A California and Federal Labor Law poster *and* a Wage Order poster of your choice.
- Full details and pre-orders available at https://store.calchamber.com/10032179-mastpaga/products/employment-law/paga-wage-and-hour-compliance-toolkit.

Certificate of Completion

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(Name)

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