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Labor & Employment Update

June 26, 2024

## Potential Reform of the California Labor Code Private Attorneys General Act (PAGA)

This proposed legislation, if enacted, would constitute the most significant modification of PAGA since it was enacted two decades ago, and would provide employers with significant new options when facing claims brought under PAGA.

After months of negotiations, bills that would substantially reform the California Private Attorneys General Act (PAGA) were introduced in the California Assembly and Senate on June 21, 2024. This proposed legislation, if enacted, would constitute the most significant modification of PAGA since it was enacted two decades ago, and would provide employers with significant new options when facing claims brought under PAGA.

Among other things, the proposed reform would impose new limits on who can bring a PAGA action and the scope of Labor Code violations that a plaintiff can pursue, create caps on penalties for employers who can demonstrate reasonable compliance, reduce penalties for certain types of violations (such as technical defects in wage statements), and provide employers with greater opportunities to cure alleged violations. The law would also for the first time permit injunctive relief in PAGA actions and allocate a greater share of any civil penalties to employees. The bills state that these reforms would apply to PAGA actions brought on or after June 19, 2024, unless the plaintiff submitted a PAGA notice before June 19.

Given the nature of these reforms, and the prevalence of PAGA actions in recent years, we expect significant litigation over the meaning and application of these new provisions if the

proposed reform is enacted. California employers should be prepared to leverage these changes in any new PAGA litigation.

## **I. Background of PAGA Reform**

There is currently a [ballot measure to repeal PAGA](#) that is set to go to California voters in the November 2024 election. The ballot measure, if enacted, would eliminate private PAGA actions, and replace PAGA with a new law imposing increased penalties but with enforcement limited to state regulators.

Last week, following months of discussions between Governor Newsom, labor advocates, and business groups, [Governor Newsom announced a deal](#) on proposed PAGA amendments to “avert [the] contentious ballot measure.” On Friday, [Assembly Bill 2288](#) and [Senate Bill 92](#) were introduced, which memorialize the agreement to reform PAGA. If the legislation is signed into law by June 27, then the PAGA repeal ballot initiative will be withdrawn from the ballot.

## **II. Key Provisions of the Proposed PAGA Reform**

### **A. Limitations on Standing**

The proposed legislation would impose two substantive limitations on standing. First, it would require a plaintiff to have personally suffered each of the Labor Code violations they are seeking to pursue on a representative basis. This change is a response to the Court of Appeal’s decision in *Huff v. Securitas Security USA Services, Inc.*, 23 Cal.App.5th 745 (2018), which has been interpreted to permit a PAGA plaintiff to recover PAGA penalties not only for alleged Labor Code violations that the plaintiff personally suffered, but also other alleged violations that only affected other employees. The proposed legislation makes clear that a plaintiff must prove that they personally suffered the same alleged Labor Code violations they seek to pursue on behalf of other employees. There is an exception to this new requirement for PAGA actions filed by employees represented by certain nonprofit legal aid organizations.

Second, the proposed legislation makes clear that the PAGA plaintiff must have personally suffered each alleged violation within one year of filing a PAGA notice with the Labor & Workforce Development Agency (LWDA). This change is a response to the Court of Appeal’s decision in *Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal.App.5th 924 (2021), which PAGA plaintiffs have used to argue that a PAGA action could be premised on a Labor Code violation regardless of when it occurred. The proposed legislation clarifies that a plaintiff seeking to file a PAGA action must have experienced a Labor Code violation during the one-year limitations period under Section 340 of the Code of Civil Procedure.

### **B. Courts May “Limit the Scope” of PAGA Claims Prior to Trial**

The proposed legislation empowers trial courts to both limit evidence at trial and limit the scope of any PAGA claim to ensure that it can be effectively tried. This is effectively a codification of the California Supreme Court’s decision in *Estrada v. Carpet Royalty Mills, Inc.*, 15 Cal.5th 582 (2024), which held that trial courts cannot *strike* an entire PAGA claim on manageability grounds, but can and should use their “numerous tools . . . to *manage* complex cases generally, and

PAGA cases in particular.” *Id.* at 618 (emphasis added). More information about the *Estrada* decision is available [here](#).

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

### **C. Reductions in PAGA Penalties**

#### **1. Caps When Employer Takes “All Reasonable Steps to Comply”**

The proposed legislation expands PAGA’s cure provisions and rewards employers who proactively take “all reasonable steps” to comply with the Labor Code.

First, if an employer cures an alleged violation and takes “all reasonable steps to be prospectively in compliance” either before or within 60 days of receiving a notice of a claimed PAGA violation, then the employer will not be liable for any penalty. The proposed legislation provides examples of “reasonable steps,” 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 shall be evaluated by a “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 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, but does not cure the alleged violation, then the available penalties are capped 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, but does not cure the alleged violations, then penalties would be capped at 30%.

Finally, penalties will be capped at \$15 per employee per pay period if an employer cures the alleged violations but does not take “all reasonable steps to prospectively be in compliance” with the law.

These cure provisions, if enacted, will likely become a significant part of responding to PAGA actions given the potential for substantial reductions in PAGA penalties.

#### **2. Reductions for Harmless Violations**

Under the proposed legislation, penalties for technical wage statement violations would be capped at \$25 per employee per pay period if an employee can easily determine the required information despite the alleged error. In addition, for isolated errors that occur for less than 30 days or four consecutive pay periods, the maximum penalty available is \$50.

#### **3. Limits on \$200 Penalty for “Subsequent Violations”**

PAGA currently allows for a default penalty of \$200 per pay period for each “subsequent violation,” rather than the standard \$100 penalty for “initial” violations. The proposed legislation limits this higher penalty by making it clear that it will be assessed only after any agency or court “has 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, or if the court finds the employer’s conduct was “malicious, fraudulent, or oppressive.”

#### **4. 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 timely pay wages during employment, and failure to timely pay wages upon termination based on the same underlying underpayment. The proposed legislation would prohibit an employee from seeking derivative penalties for failure to timely pay wages claims unless the underpayment was willful or intentional, and, for wage statement claims, unless the violation was knowing or intentional.

#### **D. Early Case Resolution Procedures**

The proposed legislation also introduces new cure mechanisms for employers wanting early resolution. If an employer has less than 100 total employees during the PAGA 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 employer in an attempt to reach an early resolution for the matter. 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 bill allows the employer to file a request for a stay and an “early evaluation conference” with the court after a PAGA claim is filed, which requires the court stay all discovery and responsive pleading deadlines. Once the conference is set, the employer must submit (and serve plaintiff) a confidential statement to a “neutral evaluator”—which the legislation does not define—that details the allegations the employer disputes, which alleged violations it intends to cure, and the 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 conference is successful (*i.e.*, the neutral and parties agree to a proposal and the alleged violations are cured), then it is treated as a confidential settlement of that claim. Notably, if the neutral or plaintiff does not agree that the employer has cured the alleged violations, then the employer may file a motion to request the court approve the cure and submit evidence showing correction of the alleged violations.

Unlike the other proposed amendments to PAGA, the early resolution provisions do not become operative until October 1, 2024. But like the other proposed amendments, the early resolution procedures would apply to PAGA actions brought on or after June 19, 2024 (unless the plaintiff submitted a PAGA notice before June 19).

### **E. Limitations of Potential Penalties for Employers Who Pay Weekly**

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

### **F. Employee-Focused Reforms**

Although most of the proposed reforms are designed to address concerns of employers over abuses of PAGA, the proposed legislation does have two changes designed to benefit employees. First, for the first time a PAGA plaintiff would be able to seek injunctive relief. Second, aggrieved employees will now receive a 35% share of any recovery (an increase from 25%).

### **III. Conclusion**

The proposed reform of PAGA would create a new era in California employment litigation, as it would provide employers with significant additional tools to address and defend PAGA claims. Employers should begin preparing now to utilize these tools in future PAGA litigation and should carefully track how courts are applying and interpreting these amendments.

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