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PAGA Reform is Officially Here

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The California Legislature has taken action to amend the California Private Attorneys General Act ("PAGA") with some of the most significant changes to the law in its 20-year history. After Governor Newsom announced that an agreement had been reached to amend PAGA, he signed two new bills into law: Assembly Bill 2288 and Senate Bill 92.

PAGA allows employees to sue businesses on behalf of themselves, other employees, and the state itself when they believe there has been a violation of the California Labor Code. Since its passage in 2004, the prior statute, along with subsequent case law interpreting it, resulted in tremendous PAGA awards/settlements and attorneys' fees against employers with nominal actual financial benefits to workers. The new legislation attempts to respond to this: it ensures workers continue to retain a vehicle to resolve labor claims while limiting the negative impact on employers.

Changes to PAGA under New Bills

AB 2288 amends Labor Code section 2699, while SB 92 amends Labor Code section 2699.5 and amends, repeals, and adds Labor Code section 2699.3. The important changes are highlighted below.

Stricter Standing Requirements

- *Personal Experience:* An "aggrieved employee" must have "personally suffered each of the Labor Code violations alleged" to recover on a representative basis.

- One exception to this standing rule applies to PAGA actions brought by an existing nonprofit legal aid organization.

- *Statute of Limitations:* A plaintiff-employee must have personally experienced the Labor Code violation within the one-year statute of limitations (previously, there was no time limitation).

Penalty Structure

- *Increased Portion of Penalties to Employees:* Employees can receive an increased penalty amount from 25 percent to 35 percent, with the state now receiving 65 percent.

- *Caps on Penalties when Employers Take Reasonable Steps for Compliance:* 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, then the available penalties are capped at 15 percent of the penalties sought. Further, if an employer "has taken all reasonable steps to prospectively be in compliance with all provisions identified in the notice," then the available penalties are capped at 30 percent. Examples of such reasonable steps include but are explicitly not limited to, conducting periodic payroll audits, taking action in response to the results of the audit, disseminating lawful written policies, training supervisors on applicable Labor Code and wage order compliance, or taking appropriate corrective action with regard to supervisors as needed.

- *Limitations on $200 Subsequent Violation:* The $200 penalty for a "subsequent violation" can be awarded only: (1) if there has been a court or agency determination within the last five years that the employer had an unlawful policy or practice that caused the violation, or (2) if a court determines that the employer's conduct which caused the violation was malicious, fraudulent or oppressive.

- *Cap on Penalties for Wage Statement Violations:* If a wage statement violation under Labor Code section 226 does not cause harm to the plaintiff, then the available penalty is capped at $25.

- The new law also confirms that penalties for Labor Code section 226 violations are the only penalties available for wage statement violations, foreclosing arguments by plaintiffs that they can seek penalties under Labor Code section 226.3 as well.

- *Employers with Weekly Pay Periods:* For employers with weekly pay cycles, the penalty amount is reduced by half (as a reminder, PAGA imposes penalties on a pay period basis).

- *No Derivative Penalties:* An employee-plaintiff cannot combine PAGA penalties, as penalties cannot be awarded for derivative claims under various Labor Code sections. This curbs attempts by plaintiffs to try to "double-dip" on penalty recovery.

- *Isolated Errors:* Penalties reduced from $100 to $50 per pay period for each aggrieved employee where the alleged violation resulted from an isolated, nonrecurring event that did not extend beyond the lesser of (1) 30 consecutive days or (2) four consecutive pay periods.

- *Court's Discretion:* The new legislation has now codified the court's discretion to adjust the amount of penalties awarded based on the circumstances of the case.

Employer's Right to Cure

- An employer is able to cure additional Labor Code sections including section 226 (wage statements), section 226.7 (failure to pay meal/rest period premiums), section 510 (overtime), and section 2802 (expense reimbursement). The early resolution provisions do not become operative until October 1, 2024.

- For PAGA notices filed between June 19, 2024, and October 1, 2024, an employer may cure any of the violations outlined above within 33 calendar days of the postmark date of the notice. If the employer gives written notice of the cure within that period by certified mail to the aggrieved employee or representative and by online filing with the LWDA, including a description of actions taken, then no PAGA action may commence.

- For PAGA notices filed on or after October 1, 2024, the steps required for curing violations vary depending upon the size of the employer:

- Employers that employ 100 or more employees may request an "early evaluation conference" with the court and a stay of discovery and responsive pleading proceedings. At the conference, a neutral evaluator will review the employer's statement, which should detail the disputed allegations, which alleged violations it intends to cure, and the employer's proposed plan to cure the alleged violations, as well as the plaintiff's response statement. If the evaluator and the parties agree to a proposal, the neutral evaluator will monitor compliance with the plan for a cure and consider the employer's efforts in limiting potential penalties. If the employer cures the alleged violations, the court treats it as a confidential settlement of that claim. However, if the plaintiffs or neutral do not find the cure sufficient, the employer may also file a motion to request the court to approve the cure and submit evidence showing correction of the alleged violations.

- Employers with less than 100 employees may submit to the Labor and Workforce Development Agency ("LWDA") a proposal to cure within 33 days of receipt of a PAGA notice. The LWDA will then schedule a settlement conference in an attempt to reach an early resolution (similar to those held by the Labor Commissioner for individual wage claims).

Injunctive Relief Now Available

- Plaintiffs can now seek, and courts may grant, injunctive relief as an available remedy under PAGA to compel businesses to implement changes in the workplace to remedy labor code violations.

Judicial Manageability

- Courts have the power to determine manageability over PAGA claims and provide that it "may limit the evidence to be presented at trial or otherwise limit the scope of any claim filed to ensure that the claim can be effectively tried."

Effect on Present and Future PAGA Claims

As anticipated, the legislation specifies that these amendments are not retroactive and apply only to PAGA actions (or notices) initiated on or after June 19, 2024, with the exception of the early resolution provisions. Nevertheless, this PAGA reform is welcome news for California employers as it provides businesses a more meaningful opportunity to act swiftly to cure any violations and limit exposure upon receipt of a PAGA notice.

Should you have any questions regarding how this new legislation may impact your business practice or current cases, or if you would like more information on the subject, please contact the authors or a GRSM employment law attorney.

The GRSM Employment Law practice group will lead a complimentary webinar, "2024 PAGA Reform – Important Development for Employers" on July 31. To learn more and register, please click here.