Westlaw Today
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'New PAGA' brings guarded optimism to California employers

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JULY 19, 2024

- Long-awaited PAGA reform legislation ("New PAGA") brings significant change and some clarification to the 20-year-old law, reconciling previously ambiguous interpretations of the law, as well as adding new provisions that will have far-reaching effects on the litigation of PAGA actions.
- The new law provides further guidance and new opportunities for employers with respect to plaintiff standing; cure, remediation, and early settlement opportunities; and adjusted default penalty amounts. We expect these changes to generate significant future litigation as to their scope and implementation.

Since its entry onto the legal scene in 2004, the Private Attorneys General Act of the California Labor Code ("PAGA") has posed a formidable challenge to employers of all sizes striving to manage the disparate requirements of California wage and hour law in a constantly evolving landscape of standards and the threat of potentially devastating civil penalties.

The PAGA reform bill provides new or codified guidance on key issues such as aggrieved employee standing, penalty calculation, and opportunities for cure and remediation.

Reform efforts led to the passage last week of the highly anticipated compromise PAGA reform bill. The bill, signed by Governor Newsom on July 1, 2024, took immediate effect and resulted in the withdrawal of a PAGA reform initiative that would have appeared on the November ballot.

As discussed below, the PAGA reform bill (also referred to as "New PAGA") strives to address a number of core challenges and ambiguities that courts and employers alike have struggled with over the past 20 years. It provides new or codified guidance on key issues such as aggrieved employee standing, penalty calculation, and opportunities for cure and remediation.

In total, the statute is targeted towards reforms that focus PAGA exposure on actual experienced violations and employers that have not taken all reasonable and appropriate steps to comply with Labor Code requirements, either proactively or after receiving actionable notice of noncompliance. In doing so, New PAGA also contains a number of new and remaining uncertainties that will likely require court interpretation in the coming years.

New PAGA applies to PAGA civil complaints that are filed after June 19, 2024, and also involve a PAGA notice to the LWDA sent on or after June 19. For all other actions — those currently pending or based on LWDA notices provided prior to June 19 — the prior "Old PAGA" rules will apply.

New PAGA strengthens standing requirements for employee plaintiffs, reversing prior practice

Previously, an employee who was "aggrieved" under PAGA (*i.e.*, had suffered a California Labor Code violation of any kind) could sue under PAGA on behalf of himself and other current or former employees who had suffered the same or *any other kind* of Labor Code violation. Under New PAGA, an employee who is aggrieved can only sue on behalf of themself and other current or former employees against whom a violation of the *same* Labor Code provision was committed.

This change is significant, as it departs from a line of cases that began with a California Court of Appeal's decision permitting a PAGA plaintiff to allege any number of Labor Code violations that the plaintiff did not personally suffer on behalf of other "aggrieved employees."

A PAGA plaintiff will now have to establish *which specific violations they personally suffered* before they have any right to prosecute a PAGA claim, as that threshold determination of which Labor Code violations the plaintiff suffered will define the scope of the group of aggrieved employees the plaintiff can represent in the action, and, necessarily, the scope of discovery the plaintiff should be permitted to investigate and prosecute such claims.[1]

This change is also consistent with, and codifies, recent caselaw recognizing that evidentiary and other procedural limitations on the litigation and trial of PAGA matters are necessary and appropriate to permit trial courts to effectively manage these cases.

We anticipate that the New PAGA standing limitations will significantly reduce manageability issues at trial by limiting the scope of claims to those with which the plaintiff has personal experience. Instead, those scope challenges will need to be resolved earlier in the proceedings through factual determinations (whether made by the court or an arbitrator, as appropriate) regarding the plaintiff's individually suffered violations.

Of further note, New PAGA also clarifies that the PAGA plaintiff must have experienced the violations they prosecute *within the one-year statute of limitations*. This change resolves the question that arose following a Court of Appeal decision holding that at least under certain circumstances and with regard to certain types of violations, a PAGA plaintiff could pursue civil penalties on behalf of other aggrieved employees, even if their own violations were time-barred as occurring outside of the one-year statutory period.

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New PAGA affirmatively clarifies that a plaintiff must have personally suffered a Labor Code violation *within the PAGA statute of limitations*.

Taken together, these two key codifications of the statute regarding standing promise to bring substantial clarification to employers regarding the scope of penalties at issue in an asserted claim. They will also provide opportunities to appropriately limit the investigation, discovery, and motion practice necessary to understand and litigate the violations alleged by a particular plaintiff.

New PAGA expands cure, remediation, and early settlement opportunities for employers to reduce or eliminate potential liability

A primary area of change in New PAGA, and one that is likely to generate significant litigation as to its scope and implementation, is the expanded provision for cure and remediation of asserted violations. The prior version of the law contained very limited cure opportunities that were available only in limited situations, most notably related to certain wage statement issues.

New PAGA provides incentives for maintaining compliant practices — and fixing non-compliance if and when it is identified — by reducing potential exposure based on employer behavior at three stages: (1) remediation (reasonable steps for prospective compliance before or soon after any violation is alleged); (2) cure (prompt and effective fix of violations alleged in an LWDA Notice); and (3) early settlement (resolution of a claim.).

Employers should review compliance and audit practices in light of new remediation considerations in PAGA litigation

PAGA has always permitted courts some degree of discretion to reduce penalties, based on an employer's remediation efforts. New PAGA expands and clarifies the scope of that discretion in specific ways. It specifies a reduction to 15-30% of the default penalties, assuming reasonable steps towards proactive and ongoing compliance have been implemented either prior to or soon after receiving the LWDA Notice.

Default penalties can be reduced by 85% if, *prior to* receiving the LWDA Notice or a request for personnel/payroll records from an aggrieved employee, the employer has taken all reasonable steps to be in compliance with all provisions identified in the Notice.

"All reasonable steps" may include activities such as conducting periodic payroll audits and acting in response to their results, disseminating lawful written policies, training supervisors on Labor Code and wage and hour compliance, and taking appropriate corrective action with regard to supervisors.

Default penalties will be reduced by 70% if, within 60 days of receiving an LWDA notice, the employer has taken all reasonable steps to prospectively come into compliance with all provisions identified in the notice. Further, if an employer remediates *and* cures a violation, no civil penalty is available for that violation.

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The specific steps that will constitute sufficient remediation will depend on the circumstances, alleged violations, nature and size of the employer, and other factors. We encourage employers to assess and, as necessary, update and reinforce their policy, training, and audit practices in preparation for making such an argument.

Employers should consult counsel in reviewing these practices for advice on their sufficiency under the circumstances and to assess privilege and confidentiality issues.

Cure provisions applying to asserted violations are expanded, but employers need to act quickly upon receipt of LWDA notice

New PAGA greatly expands the Labor Code provisions for which an employer may cure a violation once it is asserted in an LWDA notice, including many violations that have been the frequent target of PAGA lawsuits. This is potentially good news for employers seeking to fix noncompliant practices, provide remedies to impacted

employees, and avoid costly litigation, but significant ambiguities remain.

For violations other than for failure to provide accurate wage statements, the statute provides that an employer cures by correcting the violation, coming into compliance with the underlying Labor Code section, and making each aggrieved employee "whole," which includes paying any unpaid wages going back three years plus 7% interest, liquidated damages, and attorneys' fees and costs to be determined by the LWDA or court.

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An employer is generally permitted to cure and avoid PAGA liability on a claim but questions remain regarding how such cure provisions would apply in specific situations, particularly where the alleged violation is disputed or vaguely asserted.

What does it mean, for example, to "cure" an allegation that the employee experienced interruptions of his meal periods where the employer already maintains lawful policies and training? Similarly, what amount of attorney fees is sufficient to cure where the cure itself is made prior to any finding by the LWDA or a court?

The steps to cure an alleged wage statement deficiency are more clearly defined and actionable: the failure to include the name and/or address of the legal employer on wage statements can be cured by providing written notice of the correct information to each aggrieved employee and may be provided in "summary form" — *i.e.*, a new, corrected wage statement is not required to be sent for each violation.

The failure to include other required information on wage statements, such as wage rates or total hours worked, can be cured by providing a fully compliant, itemized wage statement to each employee for each pay period in which the violation occurred for the prior three years and can be provided in digital form if that is how the wage statements are customarily provided.

In combination with the elimination of "derivative" wage statement violations, this provides a significant opportunity to avoid liability on technical violations that have been a particular source of outsized penalty exposure under the prior statute.[2]

The ability to cure is not unlimited. An employer is prohibited from availing itself of the notice and cure provisions more than one time in a 12-month period for violations of the same provision, regardless of the location of the worksite. An employer that receives notice of an alleged violation, opts not to cure, and later receives a second notice of that violation also has a limited ability to cure.

Despite the expansion of available cure provisions, many employers will likely struggle to meet the tight deadline to evaluate claims, calculate monies owed, and implement the cure for potentially numerous employees.

Moreover, employers lack guidance as to the actual "amounts sufficient to cover any unpaid wages that the agency or court determine could reasonably be owed ... based on the violations alleged" and other open issues as to cure.

Regardless, any employer receiving a LWDA notice after June 19 should immediately consult counsel to explore potential cure options.

New early evaluation and settlement process provides opportunity to address and correct violations before extensive litigation, but availability uncertain

An early evaluation and settlement process is a new addition to the law. Effective October 1, 2024, smaller employers (less than 100 employees during the prior year) have the opportunity to present a cure plan to the LWDA within 33 days of receiving the LWDA notice letter containing the alleged violations.

The LWDA can then conduct a conference between the parties to determine if the cure plan is sufficient. If the LWDA rejects the proposal without a conference, or chooses not to have a conference, however, the plaintiff may proceed with filing a civil action. The option of getting a cure proposal approved and avoiding a civil action would be a substantial benefit to smaller employers facing PAGA claims.

The ability to stay court proceedings, and proactively cure an extended range of Labor Code violations to avoid incurring significant PAGA penalties provides an enticing opportunity for employers.

LWDA resources are limited, however, and no additional funding appears to be supplied with New PAGA to fund this process. This raises doubts as to the LWDA's capacity to conduct plan reviews and conferences within the very limited time window before a civil action can be commenced by the plaintiff.

Larger employers (100+ employees) have access to a new early settlement process *after* a PAGA lawsuit is filed. In response to a PAGA lawsuit, the employer may file a request for an early evaluation conference (EEC) and the civil action will typically be stayed pending completion of the EEC within 70 days.

Effective October 1, 2024, smaller employers will also have access to the EEC process if the LWDA failed to timely act on the employer's cure plan per the process described in the preceding paragraph.

The EEC is a novel process, and its efficacy is uncertain. At the very least, it may present an early opportunity for identification of the

value of the specific asserted violations, assessment by a neutral, and potential settlement if agreement is reached as the proposed cure. If the employer implements a cure plan but cannot get the evaluator or plaintiff to agree the cure was sufficient, the employer can then seek approval from the court.

The quick preparation and scheduling of EECs under the statute is likely to be a logistical challenge, but is also an opportunity to challenge many PAGA claims at the outset before significant fees are incurred by either side. The precise impact and proceedings for EECs are open questions that will need to evolve and be defined under the new law.

New PAGA signals that the legislature recognizes the strain that PAGA litigation has placed on many California businesses and seeks to re-focus PAGA practice on rewarding and encouraging compliance.

The ability to stay court proceedings, and proactively cure an extended range of Labor Code violations to avoid incurring significant PAGA penalties provides an enticing opportunity for employers. However, tight deadlines and legal and factual disagreements as to alleged violations may limit the effectiveness of this provision in avoiding many PAGA lawsuits.

New PAGA expands provisions on PAGA penalty amounts, retaining court discretion with additional guidance

Over the past 20 years of PAGA litigation, a frequent frustration for employers has been the calculation of *potential* PAGA penalties. Although these penalties remain subject to the discretion of the trial court under New PAGA, the revised statute expands its guidance on the default penalty amounts based on the type and severity of the violations.

This scheme clarifies or resolves a number of ongoing interpretation disputes under the prior law, but also sets up new ambiguities that employers will need to navigate and carefully consider. The changes include the following:

- **Removing the penalty faced by employers that pay more frequently**. Under New PAGA, employers that pay on a weekly basis will face a 50% reduction in the per-pay-period penalties that would otherwise apply to the violation at issue. This resolves an arbitrary idiosyncrasy in the prior law whereby the calculation of penalties on a per-pay-period basis exposed employers that pay their employee more frequently to higher potential penalties on that basis alone.
- **Disallowing penalties for "derivative" violations caused by the same underlying conduct.** New PAGA eliminates the arguments about "stacking" of PAGA penalties for multiple Labor Code violations caused by the same underlying conduct — a frequent issue in PAGA litigation that had not been effectively addressed under the prior law. Under New PAGA, an employee who recovers civil penalties for an underlying wage violation (such as minimum wage or underpaid overtime) cannot *also* collect civil penalties for related or derivative claims of failure to pay wages at termination, failure to pay wages during employment (unless willful or intentional), or failure to provide a compliant wage statement (unless knowing or intentional). This change has the potential to significantly decrease overall PAGA exposure in civil actions and narrow and focus the scope of the claims. For example, to assert a PAGA claim for an inaccurate wage statement, a plaintiff will now need to identify a specific facial issue with the wage statement itself, rather than rely on the fact that the wage statement does not reflect payment of some category of wage the plaintiff claims has been unpaid. This change is particularly significant in light of the limitation on the scope of PAGA standing discussed above; taken together, they reduce the potential for high-risk, high-exposure, generalized claims that are difficult and expensive to pin down, investigate, and resolve.
- **Changes to the default penalty amounts for certain violations.** New PAGA sets a new default penalty scheme to replace the $100/$200 per employee, per pay period penalty for initial/subsequent violations that existed under the original 2004 law. The new scheme retains a $100 per aggrieved employee, per pay period default penalty, subject to several exceptions, which provide a mix of increases and decreases to default exposure compared to the prior law. As with Old PAGA, a judge retains the discretion to award less than the default civil penalty amount if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory. The New PAGA exceptions to the $100 default penalty include:
  - A $25[3] penalty for failure to include required information on a wage statement if the employee could promptly and easily determine from the wage statement alone the required information (their hourly rate of pay, hours worked, etc.) or, as to failure to correctly name the employer, if the employee would not be confused or misled about the correct identity of their employer. This reduction in the applicable penalty, in conjunction with the disallowance of derivative claims and the expanded wage-statement cure opportunities, should significantly reduce the frequency and exposure on technical wage-statement claims.
  - A $50 penalty for violations resulting from an isolated, short-duration event.
  - Replacing the prior "subsequent violation" standard, $200 is now the penalty if 1) within the prior five years, the LWDA or a court found a practice giving rise to the violation was unlawful; or 2) a court determines the employer's conduct giving rise to the violation was malicious, fraudulent, or oppressive.
  - Disallowing any penalty for all violations where the employer both cured (made employees whole for prior

violations) *and* remediated (took all reasonable steps to prospectively comply with the Labor Code provisions in the PAGA notice), and wage-statement violations that have been cured even without remediation.[4] Employers that cure but do not remediate claims asserting violations other than wage-statement issues, will be entitled to an 85% discount on the default penalty (*e.g.*, the default penalty will be $15 rather than $100). Employers that remediate but do not cure will be entitled to a discount of 70%-85% on the default penalty (making the default penalty $15-$30), depending upon whether the remediation occurred before or after the LWDA Notice was received.

- **Increases the allocation of PAGA penalties to aggrieved employees.** In the past, penalties recovered (by judgement or settlement) were payable 75% to California and 25% to the population of aggrieved employees. New PAGA increases the allocation to the aggrieved employees to 35%. The new statute does not appear to address or change the availability of an award of attorneys' fees under the statutes.

Conclusion

It is important to note that these changes to PAGA will affect actions where the LWDA Notice *and* the civil complaint were filed on or after June 19, 2024, only. Thus, actions that were pending before June 19, 2024, are bound by the pre-reform PAGA provisions.

New PAGA signals that the legislature recognizes the strain that PAGA litigation has placed on many California businesses and seeks to re-focus PAGA practice on rewarding and encouraging compliance. It demonstrates an effort to limit the increasingly expansive interpretations of PAGA that the plaintiffs' bar has advanced in recent years and limit PAGA claims to situations of actual experienced harm.

While employers should be guardedly optimistic that the reform attempts to resolve some of the more devastating aspects of the law developed over the past 20 years, the ambiguity in certain provisions and the tight deadlines for many of the more significant opportunities to cure make prompt action imperative. PAGA litigation will remain. But employers now have some opportunities to reduce their risk by taking prompt and effective compliance steps even before receiving a claim.

Notes:

[1] One limited exception to this new limitation on PAGA standing narrowly applies to certain non-profit legal aid organizations, which will be permitted to continue to represent plaintiffs asserting violations broader than those they personally experienced.

[2] Prior to October 1, 2024, a cure must be implemented within 33 days of receiving an LWDA Notice. The timeline for curing after October 1, 2024 is described in detail below.

[3] All amounts are per employee, per pay period unless otherwise stated.

[4] As discussed above, only certain specified Labor Code violations are eligible to be cured. As used herein, "remediation" generally refers to *prospective* changes to policy or practice to improve compliance, whereas a "cure" is a process to retrospectively "make whole" employees for past compliance issues.

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This article was published on Westlaw Today on July 19, 2024.