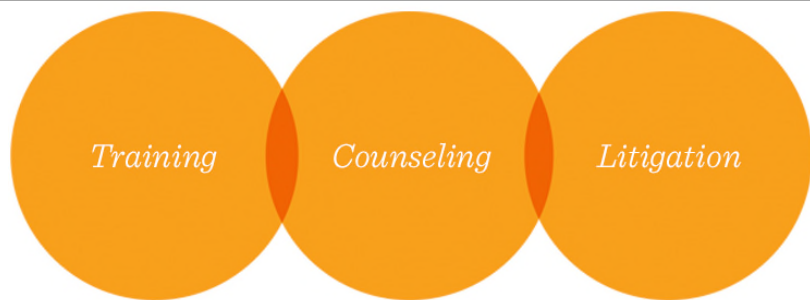




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PAGA REFORM 2024: WHAT EMPLOYERS NEED TO KNOW AND DO

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What is PAGA?

- **A 4-letter word**
- **Allows an employee to recover Labor Code penalties on behalf of the State (keep 25%)**
- **Employee has “standing” to bring claim for all PAGA penalties if he suffered one Labor Code violation at any time**
- **Penalties - \$100 per violation per pay period**
- **Massive liabilities for employers**
- **Attorney’s Fees Recoverable**



How Did We Get Here?

For years, employer groups have been lobbying for changes to PAGA because of unanticipated, massive liabilities

Employer groups obtained enough signatures to get an initiative on the November ballot that would drastically limit PAGA

Employer groups reached a deal with employee groups to limit PAGA in several significant ways in exchange for removing initiative from ballot



The Reform

PAGA reform bill passed by Legislature and signed by Gov. Newsom

Applies to all PAGA cases filed *after* June 19, 2024

“Reasonable Steps”

Employers who take “reasonable steps” to ensure Labor Code compliance will have PAGA penalties capped.

So, what is a “reasonable step”? It includes:

- **Conducting periodic payroll audits and 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.**



Reasonable Steps: How Are Penalties Limited?

- **15% of penalties *if* employer took reasonable steps before receiving a PAGA letter or request for payroll records**
- **30% of penalties *if* employer took reasonable steps within 60 days after receiving a PAGA letter**



Ambiguities With “Reasonable Steps”

- **Reform law provides that training, audits, handbook, and corrective action are “included” in what could constitute reasonable steps. But, are there others?**
- **How thorough must an audit, training be? Can judges decide what is a reasonable amount of training/reasonable audit?**
- **Attorney-client privilege issues with audit**



Reasonable Steps Are The Minimum

- **You will not have the caps:**
 - **If you have a non-compliant handbook**
 - **If you conduct no training**
 - **If you do no audit**
 - **If you do not take corrective actions**



Standing PREVIOUSLY: The bar was low

- ***Kim v. Reins International California, Inc.* (2017) 18 Cal.App.5th 1052 – Plaintiffs do not lose the ability to pursue representative claims as an “aggrieved employee” merely because they settled and dismissed their individual claims against the employer.**
 - CA Supreme Court solidified in 2020 - 9 Cal.5th 73.
- ***Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745 - Plaintiffs could pursue PAGA claims for penalties based on alleged Labor Code violations they never experienced, as long as he/she suffered at least one alleged Labor Code violation during his/her employment.**
- ***Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924 – An aggrieved employee had standing to pursue a representative claim under PAGA even if his/her individual claim was time-barred. (Note: Limited holding given that the employee continued to work for the employer during the one-year limitations period.)**
- **Roller coaster decisions on representative waivers in arbitration agreements**



Standing NOW: Stricter Requirements

PAGA plaintiffs must now prove that they have:

- Personally experienced **each and every one** of the Labor Code violations alleged in the complaint; and,
- The alleged violations occurred **within the one-year** statute of limitations.



Curing PAGA Violations – AB 2288

■ **Why Should You Cure?**

- Reduce or eliminate penalties.
- From **\$25 - \$100**/pay period and person to **\$0 - \$15**/pay period and person.

■ **How to Cure Pay Violations**

- Promptly correct the violation.
- Comply with underlying statute.
- Promptly making each aggrieved employee “whole.”
 - ***Paying unpaid wages (3 years) + 7% interest + liquidated damages + attorneys’ fees and costs.***



Curing PAGA Violations Cont. – AB 2288

- **How to Cure Wage Statement Violations (Labor Code § 226)**
 - **Failure to include name/address of employer**
 - *Provide written notice of correct information to each aggrieved employee.*
 - *Notice may be provided in summary form but must identify correct information for each pay period in which a violation occurred.*
 - **Failure to include wage rates/hours worked**
 - *Provide fully compliant, itemized wage statements to each employee for each pay period in which the violation occurred (3 years).*
- **Curing these violations could result in no civil penalties.**



Curing PAGA Violations– SB 92

■ **Cure Process for All Employers**

- Timing – **33 days** of the postmark date of PAGA Notice.
 - *Written notice by certified mail to employee/representative and by online filing with LWDA if violation is cured + description of actions taken.*
- Employee/representative may then dispute the cure notice.
- LWDA has **17 days** to review and provide a decision.
- LWDA may grant an additional **3 business days** to cure disputed violations.
- Can only cure **one time** in a **12-month period**.



Curing PAGA Violations Cont. – SB 92

- **Cure Process for Small Employers (99 or fewer employees)**
 - Timing – Within **33 days** of receipt of PAGA Notice
 - *May submit a confidential proposal to cure one or more violations + specify which violations it proposes to cure.*
 - LWDA has **14 days** to set up a conference with the parties to discuss the sufficiency of the employer’s proposal.
 - Employer will need to cure by the set deadline, but no more than **45 days** after the conference.
 - *Must provide sworn notification to employee/representative and LWDA, along with payroll audit and proof of payments.*



Curing PAGA Violations Cont.– SB 92

■ **Cure Process for Large Employers (100 or more employees)**

- **Timing – Prior to or Filed with Responsive Pleading in a PAGA Lawsuit**
 - *An employer may request an early evaluation conference in court and request a stay of court proceedings.*
 - *Request must include statement of which violations employer intends to cure and/or which violations are disputed.*
- Must submit cure plan and/or evidence for disputing violations to a neutral evaluator and serve the same on the plaintiff.
- Parties will attend mandatory early evaluation conference.
- Multi-step review process with the court to resolve or streamline PAGA claims.



“Stacking”

- Another odious feature of PAGA was ability to “stack” penalties for the same Labor Code violation—e.g., a failure to provide a meal break giving rise to derivative, “stacked” penalties for inaccurate wage statements
- Reformed PAGA law expressly bars stacking for purely derivative violations for inaccurate wage statements (LC 226), payment of wages upon termination (LC 201-203) and payment of wages during employment (LC 204).



Other Issues

Manageability:

- Key difference between class and PAGA actions: unlike class actions (with class certification process), PAGA has no clear gatekeeper mechanism to weed out claims ill suited to representative treatment.
- Reform PAGA law expressly allows courts to determine that PAGA claims are unmanageable and to limit the scope of a PAGA claim or the evidence to be presented at trial to ensure manageability (short of power to dismiss, but still useful)



Other Issues (cont'd)

- **Heightened Penalties Limited:** now \$100 penalties are the default; \$200 penalties require unfavorable court/agency determination in the last 5 years.
- **Allocation:** Employees receive more (previously 75/25 in favor of LWDA; now 65/35).
- **Court Discretion to Reduce Penalties:** reform law strengthens such discretion.
- **Short Term Violations:** max penalty of \$50 for Labor Code violations occurring over the lesser of 30 days or 4 pay periods.
- **Relief for Staffing Agencies:** Penalties cut in half (fairness issues, given weekly payroll requirement).



TRAINING – Why should you do it?

Not just about putting employees on notice of wage and hour policies! Robust training can:

- **Offer an opportunity to ask questions and see policies in action**
- **Reduce threat and/or cost of litigation**
- **Increase productivity and boost morale**
- **Lower financial strain associated with unnecessary penalties**



Training How-tos

- **Include everyone, not just hourly, non-exempt employees**
 - Training supervisors is critical
- **Live, interactive training provides the best chance for comprehension**
 - Smaller groups preferred
- **Customize for workforce/group(s) of employees**
- **Focus on weaker areas**
- **Maintain good records!**



Wage and Hour Audits

- **Written Policies**
- **Job Descriptions**
- **Wage Statements**
- **Time Records**
 - Rounding
 - Off-the-Clock Work
 - Missed meal and rest breaks
- **Vacation Wages**
- **Paid Sick Leave Wages**
- **Bonuses/Commissions**
- **Business Expenses**
- **Termination Pay Practices**
- **Witness Interviews/On-site visits**
- **Classification Audit**



PAGA Arbitration: How Did We Get Here (and What Comes Next)?

- ***Viking River and Adolph v. Uber***: arbitration of individual PAGA Claims and (if you pass “GO”) civil litigation of *representative* PAGA claims
- ***Balderas v. Fresh Start Harvesting, Inc.***: Court of Appeal decides that individual claims can be waived, so nothing to arbitrate (and go straight to civil litigation)
- **But wait: wasn't *Kim v. Reins International* (very expansive view of standing) based on prior PAGA law? Yes...so hold on tight.**



In Light of PAGA Reform, Are Arbitration Agreements a Good Idea?

- **There is no “one size fits all” answer**
- **However, having an enforceable arbitration agreement with a class action waiver and a representative/PAGA waiver (at least as to the “individual” PAGA claims) can be a powerful tool.**
- **Consider the alternatives: the costs of an individual “*Adolph v. Uber*” PAGA arbitration versus a full blown class and PAGA action.**



What will happen now?

TIME WILL TELL! But you may see the following in the near term:

- **An increase in newly filed PAGA cases**
 - Likely against employers with larger groups of aggrieved employees
- **An increase in combined class and PAGA cases**
 - Curing could give plaintiffs a path to certifying potential class claims
- **Uncertainty in the courtroom over the ambiguities**
- **Standstill of cases waiting for Early Evaluation Conferences**