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HOW DOES THE NEW PAGA REFORM EFFECT EMPLOYERS?

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As most of us in the employment law world have been following and impatiently waiting, the PAGA reform is officially signed into law by Governor Newsom as PAGA reform (AB 2288 and SB 92). So, how does this change the landscape for PAGA cases? Here is the breakdown:

- PAGA reform immediately applies to cases filed **after June 19, 2024**.
  - Effect: cases filed prior to June 19, 2024, do not have the benefit of this reform.

- **PAGA Plaintiff Personally Suffered All Violations:** The representative Plaintiff in a PAGA case must have personally suffered <u>all</u> the violations it alleged in their Complaint.
  - Example: If the Plaintiff did not have a meal break violation, they cannot be a representative for meal break violation in a PAGA case. The same is true for overtime violations, wage statement violations, rest break violations, etc.
  - This was the opposite of what the courts held prior to this reform, which was an employee could bring a PAGA action for all violations on behalf of all aggrieved employees regardless of how they suffered those violations – they needed to suffer only <u>one</u> violation of any type to represent all employees for all violations.
  - Effect: Plaintiff's counsel will need to be more careful in who they choose to be their Plaintiff for the PAGA case. Also, it allows the defense side to challenge Plaintiff's standing for some of the alleged violations.
- **One-Year Statute of Limitation:** PAGA claims are now locked into a one-year statute of limitation (which is one year and 65 days before the PAGA claim is filed).
  - Prior to the reform, the California courts struggled to define the limitations period for PAGA claims. Some courts found that aggrieved employees continued to suffer PAGA violations after the PAGA Plaintiff stopped working for the employer. Plaintiffs argued the limitations never ended because there were continuing violations regarding current employees. This ultimately rendered PAGA limitations useless.
  - Effect: PAGA Plaintiffs must have suffered violations within the one-year statute of limitations period. There is no more ambiguity on the status of limitations.
- **Some PAGA Penalties May Be Avoided and Some Reduced**
  - A good-faith dispute eliminates PAGA penalties for:
    - Failure to pay all wages due and owing upon separation (or within three days of separation for unexpected resignation), known as "waiting time penalties";
    - Failure to timely pay wages; and

        - Wage Statement Violations that were not *willful* or *intentional* (but not where the wage statement was not provided at all).
        - Effect: Employers have a viable argument that a court would not impose or would significantly reduce PAGA penalties for these claims.
    - No "Stacking" of Certain Violations
        - The reform allows the courts to reduce "stacking" penalties for violations arising from the same payroll/policy error, such as failure to pay wages upon separation in a timely manner, failure to pay wages during employment in a timely manner, and derivative wage statement violations.
        - Effect: It limits the amount recovered for violations.
    - Limits On Subsequent Penalties:
        - Prior to reform, if a penalty was not provided for under the PAGA, the default penalty was $100 for an individual violation and $200 for a subsequent violation. The plaintiff and defense bar disputed what was considered a "subsequent" violation.
        - The reform clarified that the default $100 penalty applies to all violations <u>unless</u>:
            - A court or the Labor Commissioner finds that the employer's practice or policy violated the law within the last five years or;
            - A court determines that the employer acted "maliciously, fraudulently, or oppressively."
            - If either occurs, then the $200 penalties apply.
        - Effect: this may substantially cut into the amount of the alleged penalties for the employer.
    - **Wage Statement Penalties Capped**
        - Prior to reform, the wage statement violation could be $100 or $200 per violation for each employee and pay period.
        - The reform imposes more reasonable caps.
            - Cap 1: if the employee could promptly and easily determine the accurate information from the wage statement alone, the penalty is capped at $25.
            - Cap 2: If the violation fails to accurately list the employer's name and address, and the employee would not be confused or misled about who their employer was, the penalty is capped at $25.
            - Cap 3: if a wage statement resulted from an isolated and nonrecurring event that lasted less than 30 consecutive days (for employers paying bi-weekly) or four consecutive pay periods (for employers paying weekly), the penalty is capped at $50.
            - However, as stated above, if the court finds that the employer acted maliciously or the employer violated the law in the last five years

based on prior court or agency findings, then the $200 penalty applies.

- There is no cap for employers who do not provide wage statements; the default penalties of $100/$200 apply.
- Effect: this relieves employers of the penalties on wage statements. However, there is not much relief for employers who had prior court or agency rulings for such violations.

- Employers Can Pay Weekly Without Doubling PAGA Penalties
  - Employers can now pay weekly without fear of double penalties because the PAGA reform reduces penalties by 50% for employees who pay weekly.

- **Caps on PAGA Penalties if Employers Take "All Reasonable Steps" to Comply**
  - "All Reasonable Steps" is defined as:
    - 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 regarding supervisors.
    - The reasonableness is evaluated by the totality of the circumstances and takes into consideration the size and resources available to the employer, the nature, severity, and duration of the alleged violations.
      - The existence of a violation, despite the steps taken, is insufficient to establish that an employer failed to take all reasonable steps.
  - Effect: Employers that cure the alleged violations but do not take "all reasonable steps" to comply with the law will have penalties capped at $15 per pay period. This may mean substantially less penalties to the employer.
  - Caveat: This cap does not apply if the court finds the employer acted "maliciously, fraudulently, or oppressively" or the employer's policy/practice was unlawful by a court or the Labor Commissioner within the last five years.
  - If an employer can show that they have taken "All Reasonable Steps" to comply with the law before either (1) receiving a PAGA notice or (2) receiving a request for personnel records, PAGA penalties are capped at 15%.
    - If an employer can show they took all reasonable steps to comply with the law within 60 days *after* receiving a PAGA notice, PAGA penalties are capped at 30%.

- **Employers that Cure Violations**
  - The reform allows the following list of Labor Code Violations that employers can "cure":
    - Meal/Rest Breaks
    - Minimum Wage
    - Overtime
    - Expense Reimbursement

        - Wage Statement
    - Prior to reform, only two wage-statement requirements could be cured (dates of the period for which the employee is paid and failing to list the employer's name and address). The reform allows the cure of the employer's entity name by providing a notice to each employee of the correct entity information for each pay period.
        - For all other violations, an employer must give employees corrected wage statements for each pay period in which a violation occurred in the prior three years.
    - Effect: Employers do not need to print out every corrected wage statement; rather, making them available online for employees will suffice.
    - Make Employees "Whole"
        - To make an employee "whole," an employer must:
            - Pay employees, in full, an amount sufficient to recover any owed unpaid wages due for the prior three years from the date of notice;
            - Pay 7% interest;
            - Pay any liquidated damages as required by statute; and
            - Pay reasonable lodestar attorney's fees and costs
                - The LWDA or a court determines this.
            - If there is a dispute over how much wages are owed, the employer can pay sums sufficient to cover any unpaid wages that the LWDA or court determines could reasonably be owed to the employee based on the violations alleged in the notice.
- **Cure Provisions Specific to Wage Statement**
    - Starting October 1, 2024, employers should follow a different procedure if the only alleged violation the employer is curing is a wage statement violation.
        - Employers must both cure the wage statement violations and give written notice by certified mail to the PAGA plaintiff or their counsel and file the writing online to the LWDA that describes the actions taken to cure within 33 calendar days of the postmark date of the PAGA notice.
        - If the wage statement violations are not cured within 33 days, the PAGA plaintiff may sue in court.
        - If the employee disputes that the employer cured the wage-statement violations, they (or their counsel) must provide written notice of the specific grounds to support their dispute by online filing with the LWDA and certified mail to the employer.
        - Within 17 calendar days of receiving that notice, the LWDA must review the employer's corrective action and provide written notice of its decision on the sufficiency of the cure by certified mail to the aggrieved employee and the employer.
        - The LWDA may grant the employer three more business days to cure the alleged violation.

        - If the LWDA determines that the alleged violation has not been cured or the agency fails to provide timely (or any) notification, the PAGA plaintiff may proceed in superior court.
        - If the LWDA determines that the wage statement violation has been cured, but the employee still disagrees, the employee may appeal that determination to the superior court.

- **Time to Cure**
    - **Small Employers** (less than 100 employees) have 33 days of receipt of the PAGA notice to cure their violations. Beginning **October 1, 2024**, small employers can submit a confidential proposal to the LWDA describing their plan to cure the violations alleged in the PAGA Notice.
        - Effect: Employers who receive the PAGA Notice must act quickly to prepare a proposal to cure the violations.
        - Within 14 days of receiving the proposal, the LWDA may schedule a conference with the parties to evaluate the proposed cure's sufficiency, which must be conducted within the next 30 days.
            - At the conference, the LWDA may determine whether the proposed cure is sufficient, identify any additional information necessary to evaluate its sufficiency, and set a deadline for the employer to complete the cure.
            - If the LWDA determines that the cure is not facially sufficient or does not act on the employer's cure proposal, the PAGA plaintiff can sue in court after 65 calendar days following the PAGA notice. LWDA may expand the 65-day tolling period for up to 120 days.
            - If the LWDA does not respond, the employer may request an "early evaluation conference" after the PAGA plaintiff files in court.
        - If the employer timely cures by the LWDA's deadline but no more than 45 days after the conference, the employer must provide a sworn notice to the employee and the LWDA that the cure is completed. The employer must also provide a payroll audit and check register if the alleged violations involved a payment obligation, along with any other information necessary to verify the cure. The LWDA will then verify the cure within 20 days.
            - The limitations period will be tolled if the LWDA is reviewing the cure and that takes longer than 65 days from the date of the PAGA notice.
        - If the LWDA determines the alleged violations were cured, it will notify the employer/PAGA plaintiff. If the employee challenges the determination, the LWDA will set a hearing within 30 days and issue a final determination, including its rationale, within 20 days of the hearing.
            - **If the LWDA finds the violations were adequately cured, the employee may not sue in court.** However, the PAGA plaintiff can appeal to the superior court to challenge the LWDA's determination.

        - Any amounts paid by the employer to the aggrieved employees, exclusive of penalties when curing, will be offset against any judgment later entered concerning that violation if the superior court concludes the agency abused its discretion in finding that the employer's cure was adequate.
    - The cure proposal is a confidential settlement proposal under the Evidence Code. However, the defense bar is concerned with how plaintiff's attorneys will utilize this information, including use for class certification in a class action case.
    - Employers cannot cure any violations alleged in a PAGA notice more than once in 12 months, regardless of the location of the worksite. The LWDA/cure process tolls the statute of limitations.
    - Effect: As soon as an employer gets a PAGA notice, it must act quickly to attempt a cure of the alleged violations.
- **Large Employers** (more than 100 employees) May Request an "Early Evaluation Conference" and a Mandatory Stay of the Court Case
    - ***Starting immediately***, employers with 100 or more employees who are sued under the PAGA may file a request for an "early evaluation conference" and request a stay of court proceedings prior to or simultaneous with the employer's responsive pleading or other initial appearance in the action (e.g., a notice of appearance). An "early evaluation conference" is not defined in the new law.
    - The purpose of the early evaluation conference includes, for example:
        - determining whether violations occurred and if they've been cured,
        - the strengths and weaknesses of the claims/defenses,
        - whether the claims or any part of them can be settled and
        - whether there is information that the parties could exchange to assist in the process.
    - A request for an "early evaluation conference" must include a statement related to whether the defendant intends to cure any or all of the alleged violations and must specify the alleged violations it proposes to cure, if any, and identify the allegations it disputes.
    - There is a mandatory stay in the court case when an employer requests an "early evaluation conference" (absent the court finding good cause otherwise).
    - In issuing the stay, the PAGA reform requires a court to order, in part, that (1) a mandatory conference be scheduled within 70 days of the order and require appearance by the parties; (2) the employer to submit confidentially to the neutral evaluator (judge or commissioner or a person knowledgeable about and experienced with issues arising under the code whom the court shall designate) and serve on plaintiff, within 21 days after issuance of the order,

the employer's proposed plan to cure those violations and provide the basis and evidence for disputing any uncured violations; (3) orders plaintiff, within 21 days from service of the employer's proposed cure plan, to submit to the neutral evaluator and serve on the employer a confidential statement that includes, to the extent reasonably known, all of the following:

- (i) the factual basis for each of the alleged violations;
- (ii) the amount of penalties claimed for each violation, if any, and the basis for that calculation;
- (iii) the amount of attorney's fees and costs incurred to date, if any, that are being claimed;
- (iv) any demand for settlement of the entire case; and
- (v) the basis for accepting or not accepting the employer's proposed plan for curing any or all alleged violations.

- If the neutral evaluator accepts the employer's cure plan, the employer must provide evidence within 10 calendar days or a longer period as agreed by the parties or set by the neutral evaluator, demonstrating that the cure has been accomplished. If the employer fails to timely submit the required evidence sing correction of the violation, the early evaluation process and any stay may be terminated by the court.
- If the neutral evaluator and parties agree that the employer has cured the alleged violations it said it would, the parties must submit a joint statement to the court to this effect. The court should accept the submission as a proposed settlement if no non-cured violations remain. If alleged violations remain that were not cured, the court will have the discretion to defer consideration of the parties' joint statement until after "further litigation proceedings."
- If the neutral evaluator **or** plaintiff did not agree that the employer cured the alleged violations that it intended to cure, the employer may file a motion to request the court to approve the cure and submit evidence showing correction of the alleged violations. The court may request further briefing and evidentiary submissions from the parties in response to the motion.
- The early evaluation process should not extend beyond 30 days unless the parties agree to extend the time.
- Any evidence submitted for the early evaluation conference and all discussions at the early evaluation conference shall be deemed privileged and inadmissible in court.

- Aggrieved employees receive a larger portion of the PAGA funds
  - An increase from 25% to 35%
  - LWDA's portion decreases from 75% to 65%
- Injunctive Relief is Available
- The New Standing Requirement does not apply to existing nonprofit legal aid organizations.

WHAT DOES ALL THIS ULTIMATELY MEAN FOR EMPLOYERS, AND WHAT SHOULD THEY DO?

- If an employer receives a PAGA notice, timely correction and submission of the necessary information will be imperative to lower any potential penalties.
- Employers should limit discovery only to what, if any, violations the PAGA plaintiff suffered from, limiting the scope of the PAGA claim.
- Conduct a preemptive wage and hour audit to ensure you are in compliance now.
- Employers who immediately take "all reasonable steps" to come into compliance will benefit from the new caps on PAGA penalties.

PROBLEMS WITH THE PAGA REFORM

- The rules are not as beneficial for employers as the defense bar would hope.
- The rules do not provide a thorough guideline for "curing" the violations.
- The cure is nice in theory, but it requires various fixes in a timeline that is not feasible.
- The "confidential" nature of the early resolution process is not truly confidential.
    - Regardless of whether the corrective action is confidential, it will assist the plaintiff's bar in using the information to certify a class case. While an employer may "cure" the PAGA claim, they may soon face a class action claim.
- It is not feasible for LWDA to handle the level of early resolutions the reform proposes. It is likely that these cases will end up in court, nonetheless.