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PAGA 2.0 – What Employers Need to Know As PAGA Reform Becomes Law

California Employment Law Update on **July 1, 2024**

On June 27, 2024, by near-unanimous vote, the California Legislature passed two bills enacting much-needed reform to the Private Attorneys General Act (PAGA). We previously reported on the legislative compromise last week, when the deal was first announced.

The most profound changes are contained in AB 2288, which amended Labor Code § 2699—the beating heart of PAGA. AB 2288 makes several significant changes to the law, which apply to civil actions filed (or based on notices filed) on or after June 19, 2024.

- **Standing.** In perhaps the most significant change, a PAGA plaintiff now must have experienced each specific violation alleged, bringing PAGA in line with class action principles that require a plaintiff to be a member of the class. Under prior law, as long as the plaintiff experienced at least one violation, she could pursue penalties for other violations that she did not experience. However, the new standing requirement does not apply in actions where certain nonprofit legal aid organizations serve as counsel of record. Among other requirements, the organization must have served as counsel of record in PAGA actions for at least 5 years prior to January 1, 2025, so this loophole should not allow plaintiffs' lawyers to get around standing requirements by forming new organizations.

- **Statute of Limitations.** The statute specifies that a claim is not timely unless the plaintiff experienced the violation during the one-year limitations period applicable to PAGA claims. In our view, this is declarative of existing law, although for years, plaintiffs have argued that *Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal. App. 5th 924 (2021) allows PAGA plaintiffs to assert claims even if they did not experience violations during the relevant period. This change forecloses that argument.

- **Codification of Manageability Principle.** The statute provides that courts "may limit the evidence to be presented at trial or otherwise limit the scope of any claim filed pursuant to this part to ensure that the claim can be effectively tried." At first

glance, this provision would appear merely to codify the recent decision in *Estrada v. Royalty Carpet Mills, Inc.*, 15 Cal. 5th 582 (2024). Curiously, however, the text is based not on a passage from *Estrada*, but from an earlier decision, *Woodworth v. Loma Linda Univ. Med. Ctr.*, 93 Cal. App. 5th 1038, 1070 (2023). And by omitting the modifier "at trial" from the passage stating that a court may "otherwise limit the scope of any claim," this change is sure to revive the debate over courts' powers to manage PAGA claims. Arguably, the text opens the door to case management orders limiting the scope of claims *before* trial.

- **Cure Provisions.** The statute provides new cure provisions that are most robust with respect to alleged wage statement violations. For alleged violations of the requirement to accurately state the name and address of the employer on a wage statement, the employer may cure by showing that it provided written notice of the correct information to each allegedly aggrieved employee. For all other alleged violations of Labor Code § 226(a), the employer may cure by showing that it provided fully compliant wage statements to each aggrieved employee during every pay period where a violation occurred dating back 3 years from notice. Where the employer cured and took "all reasonable steps" to comply with the law (as discussed below), there is no penalty.

For all other alleged Labor Code violations, the employer can cure by showing it corrected the violations and made all aggrieved employees whole—meaning, it paid all unpaid wages due dating back 3 years from the PAGA notice plus 7 percent interest, any liquidated damages required by statute, and reasonable lodestar attorneys' fees and costs. Where an employer cures under this provision and took "all reasonable steps" to comply with the law, the maximum penalty is $15 per pay period.

- **Discretion to Award More Than Maximum Penalty.** Under prior law, courts had discretion to award less than the maximum penalty if to do otherwise would result in an award that is "unjust, arbitrary and oppressive, or confiscatory." The new law retains that discretion, but also allows courts to award *more* than the maximum penalty, using the same criteria. In practice, it appears that only an "unjustly" low award would trigger this discretion (which presumably will be used sparingly), because it would be nonsensical to increase an already "oppressive" or "confiscatory" award.

- **Changes to Default Penalties.** Under prior law, for any violation where the Labor Code did not already provide a penalty, the maximum penalty was $100 per pay period for an "initial" violation and $200 per pay period for a "subsequent" violation, where a "subsequent" violation means a court or the labor commissioner previously found the employer had violated the Labor Code section at issue. The

new law changes this by making the default $100 unless one of the following two applies: (1) a court or the labor commissioner found *in the last five years* that the employer's policy or practice giving rise to the violation was unlawful, or (2) the court determines that the employer's conduct was "malicious, fraudulent, or oppressive." If either of these applies, the default maximum increases to $200 per pay period.

- **Lower Penalties for Certain Technical Violations.** The statute provides lower default maximum penalties for certain violations, as long as the heightened default penalty does not apply:
  - $25 per pay period for violations of the requirement to accurately list the employer's name and address, if the employee would not be confused or misled about identity of employer;
  - $25 per pay period for other wage statement violations if the employee could promptly and easily determine the accurate information from the wage statement alone; and
  - $50 per pay period if the violation resulted from an isolated, nonrecurring event that did not extend beyond the lesser of 30 consecutive days or four consecutive pay periods.

- **Lower Penalties for Taking "All Reasonable Steps" to Comply.** Except where heightened penalties apply, no more than 15% of the maximum penalty can be awarded if the employer took "all reasonable steps" to be in compliance with all provisions in the PAGA notice prior to receiving the notice, and no more than 30% of the maximum penalty can be awarded if the employer did so within 60 days after receiving the notice.

"All reasonable steps" may include that the employer "conducted periodic payroll audits and took action in response to the results of the audit, disseminated lawful written policies, trained supervisors on applicable Labor Code and wage order compliance, or took appropriate corrective action with regard to supervisors." Whether conduct was reasonable is based on totality of the circumstances and takes into consideration "the size and resources available to the employer, and the nature, severity and duration of the alleged violations." As noted above, the "all reasonable steps" standard also determines the penalties available where an employer avails itself of PAGA's new cure provisions.

- **Anti-Stacking Provision.** The statute provides that no penalty is available for (1) a derivative violation of §§ 201, 202, 203; (2) a derivative violation of § 204 that is

neither willful nor intentional; or (3) a derivative violation of § 226 that is neither knowing nor intentional, and not a complete failure to provide a wage statement. Most courts were not "stacking" penalties in this way, but plaintiffs could theoretically seek such penalties, which could have an impact on settlement value.

- **Lower Penalties for Weekly Pay Periods.** Under prior law, an employer theoretically could be penalized more harshly by paying on a weekly basis as opposed to biweekly or semimonthly, because the maximum penalty was based on a dollar amount *per pay period*. The new law avoids that arbitrary result by reducing penalties by one-half if the employees' regular pay period was weekly.
- **Distribution of Penalties.** Under prior law, any penalties recovered were distributed 75% to the Labor & Workforce Development Agency (LWDA) and 25% to the aggrieved employees. The amendments increase the employees' portion to 35%, with the remaining 65% going to the LWDA.
- **Injunctive Relief.** The statute now allows courts to award injunctive relief. However, as worded, it is unclear if injunctive relief is available where (1) the Labor Code already provided a civil penalty to the state agency, but (2) the Labor Code did provide injunctive relief to the state agency.

SB 92, the counterpart to AB 2288, made certain procedural changes to Labor Code § 2699.3. We will report on one such change—the creation of an early evaluation regime—in a future post.

In sum, while far short of a full repeal, the PAGA legislation passed this week includes several common sense reforms that rein in some of the most decadent excesses of the much-maligned law. As the new provisions are applied in new cases, we will monitor and report on key developments in the space.

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