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PAGA 2.0 – Early Evaluation Conferences May Help Defendants Cut to the Chase

California Employment Law Update on **July 12, 2024**

On June 27, 2024, the California Legislature passed AB 2288 and SB 92, compromise legislation that reformed the Private Attorneys General Act (PAGA) and averted a ballot measure that threatened to repeal the law entirely this November. We previously reported on the compromise here when the deal was announced, and published a primer on the substantive changes to the law here.

Arguably the most significant aspect of SB 92 is a provision allowing the employer to file a request for an early evaluation conference and a request to stay the court proceedings upon being served with the complaint. This option is available to employers with at least 100 employees in total during the relevant period and applicable to cases filed (or based on notices filed) on or after June 19, 2024. The purpose of the conference is to evaluate the following:

1. Whether any of the alleged violations occurred and if so, whether the defendant has cured the alleged violations.
2. The strengths and weaknesses of the plaintiff's claims and the defendant's defenses.
3. Whether the plaintiff's claims, including any claim for penalties or injunctive relief, can be settled in whole or in part.
4. Whether the parties should share other information that may facilitate early evaluation and resolution of the dispute.

Absent good cause to deny the request, the court must stay the action and issue an order that does the following:

1. Schedules and directs the parties to appear at an early evaluation conference no later than 70 days out, with a judge, a commissioner, or "such other person knowledge about and experienced with issues arising under" the Labor Code. Evidence Code § 1152 applies to the early evaluation conference.

2. For a defendant who has indicated it intends to cure any alleged violations, directs the defendant to submit confidentially to the neutral evaluator and the plaintiff, within 21 days, its proposed plan to cure the violations.
3. For a defendant to disputes any alleged violations, directs the defendant to submit to the neutral evaluator and the plaintiff a confidential statement including the basis and evidence for disputing the alleged violations.
4. Directs the plaintiff to submit to the neutral evaluator and defendant within 21 days after service of the defendant's cure plan a confidential statement setting forth: (i) the factual basis for the alleged violations, (ii) the amount of penalties claimed for each violation and basis for calculation, (iii) the amount of attorneys' fees incurred to date, (iv) any demand for settlement of case in its entirety, and (v) the basis for accepting or not accepting the defendant's proposed cure plan.

If the neutral evaluator accepts the defendant's proposed cure plan, the defendant must present evidence within 10 calendar days (or a longer period if agreed to by the parties and the neutral evaluator) demonstrating the violations have been cured. If all parties agree that the violations have been cured, the parties then submit a statement explaining the cure. The court will treat the statement as a proposed settlement and evaluate it under the usual standard for PAGA settlement approval. If the parties disagree about whether the violations have been cured, the defendant may file a motion to request that the court approve the cure.

While the early evaluation process is optional, defendants may benefit from forcing the plaintiff to articulate at an early stage what they believe the case is really about. In this way, the early evaluation process (coupled with the new standing requirement) could provide some protection against plaintiffs filing kitchen sink lawsuits and then using discovery to find out what violations they might actually be able to prove—a tactic that employers have become all too familiar with in recent years.

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