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PERSPECTIVE

PAGA REFORM'S IMPACT ON LITIGATION LEVELS REMAINS UNCERTAIN

PAGA at 20: New legislation could reduce litigation

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The Private Attorneys General Act (PAGA) codified in Labor Code § 2699 *et seq.* plagued California employers for 20 years. Intended to enhance enforcement and compliance with the Labor Code, PAGA burdened employers by increasing lawsuits by 1,000% since 2004.

Opponents argue that PAGA's one-way attorney fee provision (allowing employees but not employers to recover attorney fees if they prevail), disconnect between violation types and penalties, and lack of opportunities to cure – resulted in abuse of PAGA with no benefits for employees and disproportionate harm for employers.

A 2022 initiative to repeal PAGA qualified for the 2024 ballot. The proposed measure sought to remove the attorney-fee provision, award 100% of the penalties to employees (as opposed to the current structure of awarding 75% to the state and the remainder to aggrieved employees), and create an alternative enforcement mechanism.

To promote the ballot initiative, business and employer groups created the Fix PAGA coalition to lobby for reform. However, last week a Fix PAGA, California legislators, and labor groups reached a compromise to amend PAGA and remove the ballot measure.

The new legislation, California Senate Bill 92 (SB 92) and Assembly Bill 2288 (AB 2288), which are expected to be signed into law by Governor



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Gavin Newsom, propose the following changes to PAGA:

Reduced civil penalties

Current penalties under PAGA range from \$100 to \$200 per employee, per pay period. The revised legislation sets lower amounts:

For Labor Code Section 226(a) alleged violations: \$25 per employee per pay period, provided certain conditions are met. For isolated, nonrecurring events of less than 30 days or four consecutive pay periods: \$50 per employee per pay period. For all other violations: \$100 per employee per pay period.

However, if an employer “has taken all reasonable steps to be in compliance” with the provisions

identified in the PAGA notice (i.e., conducted audit, corrected per audit results, disseminated lawful policies, etc.), *before* receiving a notice or request for records, the civil penalty (if any) will not exceed 15% of the amounts above. If the employer took “reasonable steps” to cure within 60 days of receiving PAGA notice, the civil penalty (if any) will not exceed 30% of the amounts above. Employers who cure but do not take “reasonable steps” as defined, may face a \$15 per employee per pay period penalty.

A \$200 penalty may apply if a violation continued within five (5) years after a court or the Labor and Workforce Development Agency (Agency) determines the policy

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triggering the violation was unlawful, or the employer's conduct was malicious, fraudulent, or oppressive.

Further, the proposed legislation eliminates penalties for Labor Code Sections 201-204, 226 if the alleged violations are not "intentional."

Finally, the proposed legislation reduces by half penalties ordered against employers with weekly pay periods.

More for aggrieved employees

Currently, 75% of penalties recovered go to the state and the remainder to aggrieved employees. The proposed legislation changes the allocation to 65% to the state and 35% to aggrieved employees.

Actually aggrieved employees

Currently, "aggrieved employee," is broadly defined as "any person who was employed by the alleged violator and against who one or more of the alleged violations was committed." Labor Code Section 2699(c).

The California Supreme Court held: "This language indicates that PAGA standing is not inextricably linked to the plaintiff's own injury." *Kim v. Reins International California, Inc.*, 9 Cal. 5th 73, 85. To simplify, an employee did not necessarily need to be subject to a violation to pursue a PAGA claim.

The revised legislation redefines "aggrieved employee" to specify only employees who "personally suffered" a violation during the relevant time period have standing to sue under PAGA.

'If the parties and the neutral agree the alleged violations were cured, the parties can submit a statement to the court which will be treated as a proposed settlement.'

Expanding right to cure

Before pursuing a PAGA action, employees generally must provide notice to the Agency and the employer, of the alleged Labor Code violations. Currently, an employer's right to cure is limited to adding the legal name and address of the employer (Section 226(a)(6)) and inclusive pay periods (Section 226(a)(8)). The amendment expands the right to all of Section 226, and provides a cure mechanism for smaller employers:

Employers with *fewer than 100 employees* have 33 days from receipt of a PAGA notice to submit a *confidential* proposal to cure one or more of the alleged violations spe-

cified in the notice (deemed a confidential settlement communication under Evidence Code Section 1152). If the cure includes payment of unpaid wages, the Agency may ask the employer to place the

proposed cure amount (including liquidated damages and 7% interest) in escrow or provide other security.

Employers utilizing the cure option must provide sworn notification to the Agency and the employee that the cure is completed, with a payroll audit and check register (if applicable).

If the Agency determines the violation cured, the employee may not proceed with a PAGA lawsuit. Dissenting employees may appeal to the superior court. Employers may offset any amount paid (excluding penalties, if any) if a judgment is later entered with respect to the violation.

Early evaluation conference

The revised legislation provides a different resolution mechanism for employers with *100 or more employees*:

An employer-defendant may file a request for an early evaluation conference and a stay if served with a PAGA lawsuit. The employer must state whether it intends to cure any of the allegations in the complaint and identify allegations in dispute.

If granted, the Court will stay the proceedings pending the conference. The defendant must serve and submit a *confidential* plan to cure the violations or serve and submit a *confidential* statement specifying the basis for disputing the alleged violations, to the plaintiff and the assigned neutral (a judge, commissioner, or other person "knowledgeable about" PAGA). Failure by the defendant to present evidence demonstrating the violation was cured will result in termination of the conference proceedings.

If the parties and the neutral agree the alleged violations were cured, the parties can submit a statement to the court which will be treated as a proposed settlement.

The future will tell if the PAGA compromise achieved its purpose.