

JUNE 27, 2024 | STATE & LOCAL TRENDS

PAGA Reform Bills Approved in California Legislature and Awaiting Governor's Signature

By Megan S. Shaked

Last week, California Governor Gavin Newsom announced an agreement had been reached on reforms to the Private Attorneys General Act (PAGA). The Governor, legislative leaders, business groups, and labor collaborated in reaching the deal.

Today, Assembly Bill 2288 and Senate Bill 92 passed in the legislature and await approval by the Governor. The law will take effect immediately upon his signature.

The new legislation significantly alters the landscape for PAGA cases.

Background

California's Private Attorneys General Act, which was enacted in 2004, permits "aggrieved employees" to step into the shoes of the state and seek penalties for various Labor Code violations. Civil penalties recovered on a PAGA claim are split between the state and aggrieved employees, with 75 percent going to the state labor law enforcement agency and 25 percent going to aggrieved employees.

Due to the nature of the PAGA statute and court cases interpreting the applicable Labor Code provisions, PAGA has long been a challenge for employers to manage. While PAGA litigation can lead to improvements in wage and hour compliance, employees' ability to sue for minor technical violations, the ability to stack penalties to astronomical figures, and the high attorney's fees awards associated led to various cries for reform. While previous attempts to change PAGA have failed, a voter proposition to repeal PAGA was set to appear on the ballot for California voters this November. With a June 27 deadline to remove that proposition from the ballot, last week's deal came with just enough time for a last-minute push to get this proposed legislation approved and to the Governor for signature.

Expected Changes to PAGA

- **Standing:** Changes to Labor Code section 2699 would require an "aggrieved employee" personally suffer each violation alleged within a one-year statute of limitations. Currently, an aggrieved employee can seek

PAGA penalties for violations the employee did not personally suffer, so long as the employee personally experienced at least one of the alleged violations. The only exception under the amended section is that a nonprofit legal aid organization, meeting certain qualifications, can file an action on behalf of aggrieved employees who suffered alleged violations.

- **Opportunities for Cure:** Changes to Labor Code section 2699 provide an opportunity for employers to correct alleged violations. The legislation specifies what is required for alleged violations to be considered cured. For example, an employee who is owed wages is “made whole” when the employee receives an amount sufficient to recover any owed unpaid wages dating back three years, plus 7 percent interest, any liquidated damages required by statute, and reasonable attorney’s fees and costs. Changes to Labor Code section 2699.3 alters existing options to cure to allow for early evaluation of a complaint (through the state agency for smaller employers and through the courts for larger employers).
- **Changes to the Penalty Share:** The employee share of penalties will increase from 25% to 35% with the share to the state agency reducing from 75% to 65%. There remains the ability for plaintiffs to recover attorneys’ fees and costs before such penalty distribution.
- **Changes to the Penalty Amounts:** The previous dichotomy of a \$100 penalty for each aggrieved employee per pay period for the “initial violation” and a \$200 penalty for “each subsequent violation” is being removed. Instead, the heightened \$200 penalty would be reserved for employer conduct that is “malicious, fraudulent, or oppressive” or where in the last five years the state agency or a court determined an employer policy or practice giving rise to the violation was unlawful.
- **Penalty Reductions:** The legislation offers a number of opportunities for penalty reductions. Certain technical violations of the Labor Code section for wage statements (section 226) would now come with a reduced penalty of \$25 when the employee could still “promptly and easily” determine from the wage statement alone certain information required to be included. There is a similar reduced penalty for violations related to the employer name and address where the employee would not be confused or misled about the correct entity. Penalties would be reduced to \$50 if an alleged violation results from an isolated, nonrecurring event that did not extend beyond 30 consecutive days or four consecutive pay periods, whichever is less. There are some additional circumstances where penalties could be reduced to \$15 or even \$0.
- **Penalty Caps:** If an employer, before receiving the required PAGA Notice Letter or prior to receiving certain requests for records, has taken “all reasonable steps” to be in compliance, the civil penalty is limited to 15 percent of the applicable penalty. The code section offers examples of “all reasonable steps” to include conducting periodic payroll audits and taking action in response to the results, disseminating lawful written policies, training supervisors on applicable Labor Code and wage order compliance, and taking appropriate corrective action with regard to supervisors. The legislation further specifies that the employer’s conduct must be evaluated by the totality of the circumstances and take into consideration the size and resources available to the employer as well as the nature, severity and duration of the alleged violations. In addition, the statute specifies that the “existence of a violation, despite the steps taken, is insufficient to establish that an employer failed to take all reasonable steps.”
- There is another section that discusses a 30 percent limit on penalties, with exceptions, where the person in violation has, within 60 days after receiving the PAGA Notice, taken “all reasonable steps” to prospectively be in compliance with all provisions identified in the notice. The same language about “all reasonable steps” discussed above, is repeated in the subsection addressing the 30 percent penalty limit.
- There are some exceptions to when these penalty limit provisions apply.
- **Limits on Penalty Stacking:** The legislation also limits an aggrieved employee’s ability to collect penalties for

certain derivative claims that are in addition to civil penalties collected by that employee for the underlying unpaid wage violation.

- **Adjustment for Weekly Pay Period:** One reality of the current PAGA scheme, which calls for penalties per payroll period, is that employers who happen to pay on a weekly basis can have double the exposure since they have so many more pay periods. Recognizing this, the legislation calls for the penalty to be reduced by one-half if the employees' regular pay period is weekly rather than biweekly or semimonthly.

The changes are set to apply to proceedings that began on or after June 19, 2024.

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We will continue to dig into the new legislation and monitor for any updates. Meantime, now is the perfect time for employers to audit wage and hour practices, review related written policies and procedures, and make sure employees are up to date with their training.