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New PAGA is Here: What Employers Need to Know

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On July 1, 2024, California Governor Gavin Newsom signed into law the long-awaited Private Attorneys General Act (New PAGA) reform bills, AB 2288 and SB 92. This marks the first changes to PAGA since its enactment, and these significant changes apply to actions brought on or after June 19, 2024 (unless the underlying PAGA notice was submitted to the Labor and Workforce Development Agency (LWDA) before June 19, 2024).

Stricter Standing Requirements

Previously, California courts interpreted PAGA to give broad access to potential plaintiffs and allowed plaintiffs to pursue PAGA claims even if they did not personally experience each alleged Labor Code violation. Now, under New PAGA, aggrieved employees can only bring claims for alleged Labor Code violations that they actually experienced. Additionally, New PAGA clarifies the plaintiff must have experienced all the violation(s) they prosecute within the one-year statute of limitations period. These two provisions have the potential to limit the scope of PAGA actions from the outset.

Revised Penalty Scheme

New PAGA retains the default \$100 per employee, per pay period penalty, but introduces several exceptions which may increase, decrease, or eliminate the penalty. These include:

- A reduced \$25 penalty per pay period (previously \$100) for failure to include required information on a wage statement, if the employee could promptly and easily determine from the wage statement alone the required information (their hourly rate of pay, hours worked, etc.), or, where the employer was not correctly named, if the employee would not be confused or misled about the correct identity of their employer.
- A reduced \$50 penalty for violations resulting from an isolated, nonrecurring event that did not extend beyond the lesser of 30 consecutive days or four consecutive pay periods.

- A \$200 penalty where within the prior five years, the LWDA or a court found that a practice giving rise to the violation was unlawful; or a court determines the employer's conduct giving rise to the violation was malicious, fraudulent, or oppressive.

New PAGA also places a 15% cap on the penalties where, before receiving the LWDA notice or certain record requests by an aggrieved employee, an employer has taken "all reasonable steps" to comply with the provisions identified in the LWDA notice. A 30% cap is available where an employer, within 60 days after receiving the LWDA notice, takes "all reasonable steps" to comply with all provisions identified in the notice.

Whether an employer has taken "all reasonable steps" is determined by the totality of the circumstances, considering the employer's size and resources and the nature, severity, and duration of the alleged violations. Reasonable steps may include:

- Conducting an audit of the alleged violations and taking remedial action in response;
- Disseminating lawful written policies as to the alleged violations;
- Training supervisors on applicable Labor Code and wage order compliance; or
- Taking appropriate corrective action with regard to supervisors.

Under New PAGA, the trial court may award a lesser or greater amount of penalties if an award is "unjust, arbitrary and oppressive, or confiscatory."

No Stacking

New PAGA prohibits stacking penalties for derivative violations involving waiting time penalties, frequency of pay violations that are neither willful nor intentional, and wage statement violations that are neither knowing nor intentional or a failure to provide a wage statement.

Cure Rights

New PAGA expands the list of "curable" violations to include wage statement, meal and rest break, minimum wage, overtime, and expense reimbursement claims. Employers will not have to pay a penalty for a cured wage statement violation. For all other cured claims, the penalty per employee, per pay period is capped at \$15. Importantly, employers who cure violations *and* take "all reasonable steps" will not be required to pay a civil penalty for those violations.

To cure a violation, an employer must correct the violation, make each aggrieved employee whole, and comply with the underlying statutes specified in the LWDA notice. Employees who are owed wages are "made whole" when they receive an amount sufficient to recover any owed unpaid wages dating back three years from the date of the notice, plus 7% interest, any liquidated damages as required by statute, and reasonable attorneys' fees and costs to be determined by the agency or the court. To cure wage statement violations, employers may be required to provide written notice of the correct name and address of the employing entity, or provide a fully compliant, itemized wage statement to each aggrieved employee for each pay period during which the violation occurred dating back three years from the date of the notice.

Manageability

New PAGA codifies the California Supreme Court's ruling in *Estrada*, that courts may limit evidence that can be presented in trial. New PAGA also goes further by authorizing courts to limit the scope of any claim filed to ensure the claim can effectively be tried and permitting courts to consolidate or coordinate claims against an employer that are legally or factually overlapping.

Takeaways

New PAGA presents employers with several opportunities to reduce and potentially eliminate PAGA penalties. It is therefore crucial that employers understand New PAGA and either take, or be ready to promptly take, all reasonable steps to comply with California labor laws. Should you have any questions, contact your Vorys attorney.