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Practice Update

The Implications of Anticipated Amendments to PAGA for Staffing Companies

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On Friday evening, the text of anticipated amendments to the Private Attorneys General Act (PAGA) became available from the California legislature. The bills — one from the Senate and one from the Assembly — would together amend three statutory provisions of PAGA and must be read together for purposes of understanding the new law. Both bills are in committee and will likely come up for a vote in the next few days. If signed into law by June 27, 2024, the legislation will avert the PAGA repeal initiative that will otherwise be on the California ballot in November.

If the amendments become law, as is widely expected, they will apply to PAGA lawsuits brought on or after June 19, 2024, unless the related PAGA notice letter was filed before June 19, 2024. If your company has a pending PAGA litigation or is anticipating a PAGA complaint for a notice letter that was filed before June 19th, it will *not* be affected by the amendments.

There are major takeaways for the staffing industry that will matter immensely. There are also some unfortunate aspects of the legislation that counterbalance the wins. Viewed together, if enacted, the legislation could significantly change the California litigation landscape for staffing

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companies that focus significant attention on compliance.

Reduced Pay Period Exposure for Staffing Companies

First, and unquestionably most importantly, the legislation would stop penalizing employers who pay weekly instead of bi-weekly or semi-monthly. Critically, staffing employers typically pay weekly in California in order to comply with Labor Code § 201.3, which establishes the qualifications as a temporary staffing employer and requires weekly payment of wages. One significant PAGA perversity has been that because of this "compliance," which strongly benefits employees, staffing employers end up with twice as many pay periods in exposure because PAGA penalties attach "per pay period." The legislation would resolve this. **The effect will theoretically reduce by *half* the potential PAGA exposure staffing employers will face.**

Courts will retain discretion to assess civil penalties and will now *also* have discretion to issue injunctive relief (i.e., to issue an order requiring employers to do something — change practice, etc.). Courts will continue to retain discretion to *reduce* PAGA penalties and will be required to reduce them significantly if certain criteria are met.

The legislation clarifies that in general, the standard penalty is still $100 per aggrieved employee per pay period. The legislation adds some critical exceptions to that rule. First, it reduces penalties for certain wage statement-related violations of Labor Code § 226 (a) (1-7 and 9) to $25 "if the employee could promptly and easily determine from the wage statement alone the accurate information... " and also for Labor Code § 226(a)(8) "if the employee would not be confused or misled about the correct identity of their employer... " It also caps penalties at $50 for other types of Labor Code violations if the "violation resulted from an isolated, nonrecurring event that

did not extend beyond the lesser of 30... days... or four consecutive pay periods."

The legislation codifies that a $200 per employee per pay period penalty is applicable only if (1) within the five years preceding the alleged violation, the agency or any court issued a finding or determination to the employer that its policy or practice giving rise to the violation was unlawful; *or* (2) the court determines that the employer's conduct was (without a time limitation) malicious, fraudulent, or oppressive. (No, the legislature did not define what those words mean.)

Notably, the legislation eliminates penalties for derivative claims under Labor Code §§ 201–204 and 226 (with some caveats). While at first blush this seems like a good fix, it is likely an acknowledgment by implication that plaintiffs may seek "stacked" penalties for non-derivative violations occurring in the same pay period. For example, a plaintiff could recover one PAGA penalty for non-compliant meal periods during a particular pay period ***and*** another PAGA penalty for underpayment of overtime wages during the same pay period. The potential availability of stacked penalties could potentially "undo" the benefit of the reduced pay period exposure discussed above.

Legislative Fixes of Perverse Judicial Interpretations

The legislation fixes many of the "perversities" that have resulted from judicial decisions that make little sense from a practical perspective. Critically, the new legislation codifies that a PAGA plaintiff may bring a claim for only those violations of the Labor Code that he or she *actually* suffered. This "fixes" *Huff*, in which the California Court of Appeals permitted an employee who suffered a single underlying Labor Code violation to bring a PAGA claim alleging violations of *any* plausible Labor Code violations on behalf of other employees. From our perspective, this is a huge win. But, we do think

there could be a rise in multi-plaintiff PAGA litigations or a multiplicity of simultaneous PAGA litigations as a result. Notably, however, the proposed amendment permits (but unfortunately does not require) coordination of overlapping PAGA lawsuits against the same employer.

Also helpful is the proposed amendment that aggrieved employees must have suffered the alleged violation within a one year statute of limitations. This resolves ambiguity following recent decisions that permitted an employee who was employed within a one year statute of limitations period to bring a PAGA claim based on a Labor Code violation that occurred earlier in employment. This is a good development for the staffing industry.

Finally, the new legislation addresses the California Supreme Court's recent decision in *Estrada*, and now permits a court to limit evidence "or otherwise limit the scope of any claim... to ensure that the claim can be effectively tried." This manageability tool is quite helpful for staffing companies facing highly factual allegations involving a contingent workforce employed in many different locations subject to unique facts, such as meal and rest allegations.

Cure and Comply

The legislation provides employers with various opportunities to "cure" certain underlying alleged Labor Code violations after a PAGA notice letter is filed, which could reduce or eliminate penalties. The legislation provides instructions on how to cure wage statement violations (notably including 226 violations arising from underpayment of wages, although the wages need to be paid in full, plus liquidated damages (if applicable), plus 7 percent interest, plus attorneys' fees).

The proposed amendments also incentivizes compliance with the Labor Code in important respects. Critically, the legislation codifies an ***85***

percent reduction in the maximum applicable penalty if, ***before*** receiving a PAGA notice or a records request from the aggrieved employee, the employer "has taken all reasonable steps to be in compliance with all provisions identified in the notice." The amendment also explains how to demonstrate that "all reasonable steps" were taken by the employer, which "may include, but are not limited to, any of the following: 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." To determine whether all reasonable steps were taken, the court will be required to consider the totality of the circumstances, which include the size and resources of the employer, and the nature, severity, and duration of the violation. In other words, if your company is not currently on notice of a potential PAGA lawsuit, taking these "reasonable steps" to comply with the Labor Code now could result in a ***mandatory*** 85 percent reduction in penalties in the event of a future PAGA claim.

The proposed amendment also codifies a ***70 percent reduction*** in the maximum applicable penalty if, ***after*** receiving a PAGA notice, the employer "has taken all reasonable steps to be prospectively be in compliance with all provisions identified in the notice... " The amendment also explains what reasonable steps mean in this scenario (essentially the same as noted above). The practical takeaway here is, going forward, even ***after*** a PAGA lawsuit is filed against your company, taking these "reasonable steps" could cap your penalty exposure at 30 percent of the maximum.

These provision provide a ***strong*** incentive for staffing employers to establish robust compliance programs and examine operational efforts to reflect compliance.

PAGA Litigation

The amendments will also permit employers with 100 or more employees to "file a request for an early evaluation conference... and a request for a stay of court proceedings prior to or simultaneous with the defendant's responsive pleading or other initial appearance... " The purpose of the early evaluation conference would be to determine whether violations occurred, to assess the strengths and weaknesses of the case, and to determine if the case can be settled. The amendments establish a lengthy protocol for how this elective process plays out. These provisions will be helpful for staffing companies, almost all of which will fall within this provision, to have an opportunity for early evaluation.
