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Is the Wicked Witch Really Dead? California Passes Long Anticipated PAGA Reforms, But Do They Really Help Employers?

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In a lightning-fast deal brokered by Governor Gavin Newsom, California lawmakers enacted significant amendments to PAGA, California's so-called "sue-your-boss" law that deputizes millions of workers across the state to bring labor law enforcement actions against their employers. The amendments, which passed both assembly houses unanimously after attracting broad support from employer groups as well as unions and other worker-advocacy groups, avoid a November ballot initiative that could have repealed PAGA altogether. The majority of the amendments take effect immediately and apply to any PAGA notices submitted on or after June 19, 2024.

On their face, the reforms take aim at longstanding criticisms of PAGA, such as assertions that it encourages frivolous claims and provides little remuneration to employees while generating massive fees for plaintiff's attorneys. It's unclear, though, whether the new provisions are cause for employers' celebration just yet. Precisely how these reforms will play out in practice as both employers and plaintiff's lawyers adapt to them remains to be seen.

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Background

Enacted in 2003, PAGA — short for Private Attorneys General Act — authorizes "aggrieved employees" to bring actions on their own behalf as well as on behalf of other current and former employees to enforce labor code violations against their employer. In a nutshell, PAGA passes the authority of the state Labor Commissioner to enforce the Labor Code on to employees represented by private attorneys. After meeting administrative notice requirements, PAGA representatives can bring an action in court to pursue civil penalties, using the rules of civil discovery to conduct expansive investigations of employers' records, often on the basis of only superficial allegations.

Over the last two decades there have been several incremental changes and new administrative procedures to PAGA. For instance, shortly after passage, administrative notice and exhaustion requirements were added to give the Labor and Workforce Development Agency (LWDA) the power to review PAGA notices and choose to pursue its own enforcement action, barring the PAGA claim from proceeding. Later, in 2015, employers were provided with the right to cure certain wage statement violations under Labor Code § 226(a) before a claim is brought in court by providing the correct employer's name and address and/or inclusive dates of the applicable pay period. An employer can only use the cure provision once for the same violation during a 12-month period.

Notwithstanding amendments on the margins, PAGA has been subject to ongoing criticism, imposing major burdens on California employers while failing to serve the employees it is meant to protect. In 2022, a ballot initiative seeking to repeal PAGA, sponsored by a coalition of employer groups, including the California Chamber of Commerce, the New Car Dealers Association, California Restaurant Association, and the Western Growers Association, qualified for the 2024 ballot. Among other things, the initiative would have stripped employees (and

private plaintiff's attorneys) of the powers PAGA had bestowed on them, returning full enforcement authority to the Labor Commissioner, while also increasing certain penalties and directing 100 percent of recovered penalties to employees. In order to keep the initiative off the November ballot, however, Governor Gavin Newsom brokered a compromise deal between legislators, business groups, and labor advocates, which was passed on June 27, 2024, and signed into law on July 1.

Key PAGA Reforms

1. Stricter Standing Requirements

The new legislation now requires a PAGA plaintiff to have "personally suffered" each of the alleged violations at least once during the one-year statute of limitations. Although such a requirement may seem commonplace, the California Supreme Court had previously interpreted PAGA much more permissively to allow employees to pursue PAGA penalties for any alleged labor code violation as long as they suffered at least one of the violations alleged, even if the underlying labor code violation was outside the statute of limitations. This change requires PAGA plaintiffs to have more "skin in the game" with a direct connection to all the violations alleged.

2. New Penalty Structure

PAGA provides employees with a two-part remedy against employers. First, it allows employees to seek any civil penalty under the Labor Code that the Labor Commissioner could seek in a citation. Second, for the vast majority of Labor Code sections that do not have any defined civil penalty, PAGA creates a "fallback" penalty. The new legislation clears up confusion in how the fallback penalty is calculated, clarifying that in most cases it is $100 per employee per pay period, unless a specific exception applies:

- **Wage Statement Violations**: There is now a $25 per pay period cap on wage statement violations if employees could promptly and easily determine the required information or would not be confused or misled about the correct identify of the employer.

- **Violations Arising from Isolated Events**: Violations that result from an isolated, nonrecurring event that did not extend beyond 30 days or four consecutive pay periods (whichever is shorter) are capped at $50 for each aggrieved employee per pay period. This will limit exposure for violations that arise from discrete issues that are quickly fixed, such as a payroll processing error.

- **Weekly Payroll**: Employers that regularly pay employees weekly as opposed to biweekly or bimonthly will no longer be penalized for the employee-friendly practice that has long been subject to double penalties under PAGA and will instead receive a 50 percent reduction for PAGA penalties.

- **No Derivative Penalties**: The new legislation eliminates penalties for derivative claims under Labor Code §§ 201-204 that are not willful or intentional and/or those under § 226 that are not knowing or intentional. For example, if a plaintiff recovers penalties for unpaid overtime, they cannot also recover derivative penalties because the wage statements did not include that unpaid overtime.

- **Reasonable Steps to Comply with Labor Code**: Employers who take "reasonable steps" to comply with all provisions identified in a PAGA notice, either (a) before receipt of the PAGA notice or an employee's records request or (b) within 60 days of receipt of the PAGA notice, can reduce the applicable PAGA penalty by 85 percent or 75 percent, respectively. "Reasonable steps" include, but are not limited to, conducting payroll audits,

taking corrective action in response to the results of the audit, disseminating lawful written policies, training supervisors on wage and hour compliance, or taking corrective action with regard to supervisors. Critically, the reasonableness of the employer's conduct is determined by the totality of circumstances, including size and resources available, as well as the nature, severity, and duration of the alleged violations.

However, the legislation also provides a new standard for assessing heightened penalties of $200 per aggrieved employee per pay period if (a) within the last five years the LWDA or a court issues a finding or determination that an employer's policy or practice was unlawful (i.e., a "repeat offender") or (b) the court determines that the employer's conduct was malicious, fraudulent, or oppressive. What exactly qualifies as "malicious, fraudulent, or oppressive" is not clear, but employers can expect parties to litigate this issue in the coming years.

One of the criticisms leveled against PAGA in the past is that very little of the proceeds of PAGA claims ultimately go to employees, considering that plaintiff's attorneys can recover all of their fees, and then after the fees are deducted, *three-quarters* of the recovery had to be distributed to the LWDA. The new legislation adjusts this allocation to provide 35 percent to aggrieved employees, while reducing the state's share to 65 percent.

3. Broader Judicial Authority

California courts have long had discretion to award ***less*** than the full amount of PAGA penalties allowed; however, the new amendments expand that discretion by authorizing courts to (a) increase the civil penalty based on the facts and circumstances of a particular case and (b) award injunctive relief. This expansion of judicial discretion demonstrates that the courts retain punitive power, notwithstanding the slate of other employer-friendly reforms meant

to reward employers' good faith efforts to comply with the law. In addition, plaintiffs will likely add new requests for judicial declarations regarding employers' policies and practices, which could lay the foundation for heightened penalties down the road.

In addition, and perhaps more importantly, the reforms establish judicial authority to address manageability concerns related to trying PAGA claims in court. Prior to the new law's passage, the California Supreme Court recently held that judges may not impose a manageability standard on PAGA claims that would allow judges to determine whether representative PAGA claims can be tried in a fair, efficient, and effective way. The court based that decision largely on the fact that the legislature did not specifically define any manageability standard in PAGA. The new legislation now corrects this by allowing courts to limit the scope of PAGA claims and the evidence to be presented at trial to ensure that PAGA cases can be effectively tried.

Third, the new amendments now expressly permit courts to consolidate or coordinate civil actions alleging legally or factually overlapping violations against the same employer; however, the permissive language suggests that courts are not *required* to do so, and employers may still be forced to defend multiple overlapping PAGA lawsuits at the same time.

4. New Cure Provisions

While PAGA has long included an avenue for employers to cure certain Labor Code violations, that option was limited to a small number of potential violations. The new legislation drastically expands the scope of curable claims to include additional kinds of wage statement violations, as well as minimum wage, overtime, meal and rest period, and expense reimbursement claims. These expanded cure options have the potential to change the shape of PAGA litigation by giving an employer an

opportunity to cut off claims before litigation, but the cost of cure in many cases could be so onerous and expensive as to become illusory.

To "cure" a PAGA violation, an employer must:

- correct the alleged violation and comply with the underlying statutes identified in the PAGA notice; and
- make each aggrieved employee "whole" by paying any owed unpaid wages under the underlying statutes dating back three years from the date of the PAGA notice, plus 7 percent interest, any liquidated damages, and reasonable lodestar attorneys' fees and costs.

If there is a dispute over the amount of unpaid wages due, an employer can still cure the violation by paying a reasonable amount as determined by the court or LWDA based on the violations alleged. Nonetheless, the "make whole" remedy may make curing an unattractive option for many employers because of the requirement to pay liquidated damages, interest, and attorney's fees on top of the alleged unpaid wages. In some cases, the cost of the cure will likely exceed what an employer could have expected to pay to resolve claims in a private settlement prior to the reforms.

In addition, there are streamlined "cure" procedures for wage statement violations. For example, an employer can provide written notice to aggrieved employees of its correct name and address to cure § 226(a)(8) violations and provide corrected wage statements to aggrieved employees address other wage statement violations. The statute will also allow for electronic dissemination of corrected wage statements if the employer regularly provides and maintains them in that format.

5. New Options for Early Resolution

The legislation will allow employers to take advantage of new early resolution procedures,

depending on the size of their workforce. Employers with fewer than 100 employees will have the option to submit a confidential proposal to the LWDA before a lawsuit is filed to address the alleged violations. The LWDA will evaluate the proposal and may set a settlement conference before making a determination about its sufficiency in addressing the alleged violations. However, the aggrieved employee may still file a PAGA action in court if the employer fails to act or the LWDA determines the proposal is insufficient or appeal the LWDA's determination altogether. Note, however, that the early resolution process for small employers does not take effect until October 1, 2024.

Large employers (i.e., with more than 100 employees) will be able to file a request for an "early evaluation conference" when a PAGA claim is filed in court. They will also be able to request a stay of the action, including discovery and motions. The new legislation provides specific details and timelines for the early evaluation conference, which requires both sides to submit confidential statements to a neutral evaluator detailing their respective positions and supporting evidence. Critically, employers will be required to identify any violations they intend to cure and provide a plan for doing so, and aggrieved employees will be required to identify the amount of penalties claimed for each violation and provide a settlement demand, among other things. Any agreement regarding some or all of the violations will be treated as a confidential settlement by the court.

Potential Issues

The true impact of this new legislation will require time, as parties litigate various aspects in the courts. Even at this early stage, there are open questions about several aspects of the new legislation.

1. How will courts determining whether an employer's conduct was "malicious, fraudulent, or

oppressive" to trigger the heightened $200 penalty?

2. How can an employer prove it took "reasonable steps" to comply with the labor code and cap PAGA penalties?
3. What kinds of evidence will neutrals expect during the early evaluation process, and will the parties be able to meaningfully engage in settlement discussions on such a condensed timeline?

Takeaways for California Employers

Even though the long-term impact of these new PAGA provisions is unknown and will likely involve extensive litigation regarding the myriad of factual and legal wrinkles that are ingrained in PAGA, there are several things employers can and should do immediately to protect themselves.

Critically, employers should immediately take "reasonable steps" to comply with the labor code (to the extent you aren't already). That means ensuring you have compliant up-to-date handbooks and policies, training supervisors and staff on wage and hour compliance, and conducting regular payroll audits. Ideally, these measures would avoid future PAGA litigation altogether, but in the event of a PAGA lawsuit down the road, they will allow you to take advantage of the new penalty caps for taking prospective action.

In addition, you should be prepared to act quickly if and when you receive a PAGA notice. Many of the new cure and resolution provisions are only available to employers who act quickly. Build rapport between key business units (payroll, IT, and HR), vendors, and employment counsel so that everyone knows where relevant information is stored, who can access it, and how to generate reports that will allow the business to make quick, informed decisions.

If you have any questions regarding the new PAGA legislation or would like help with your company's wage and hour policies and practices, feel free to contact an Akerman Labor & Employment attorney.
