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PAGA at a crossroads

WHAT IS LEFT AFTER THE RECENT PAGA AMENDMENTS? THE SHORT ANSWER IS, A LOT!

The plaintiffs' bar avoided a catastrophe in 2024. Led by the California Labor Federation, I was a small part of a team of workers' rights advocates who helped with negotiations for months to achieve a deal to take an anti-PAGA initiative off the ballot. Hard compromises were made as we faced the eradication of Private Attorneys General Act of 2004, California Labor Code sections 2698, et seq. ("PAGA").

Increasingly a target of the California Chamber of Commerce, the initiative qualified for the November 2024 ballot and would have essentially repealed PAGA. The "Californians for Fair Pay and Accountability" sought to cut private attorneys out of enforcing California's wage-and-hour laws through this initiative and funnel all the cases to the state Labor Commissioner. The well-reported reality is that the Labor Commissioner's office struggles to keep up with the administrative complaints already filed by workers. To take private enforcement off the table would have likely led to a backlog so long as to nullify any potentially positive outcomes. As the saying goes, justice delayed is justice denied.

PAGA has increasingly been a critical tool to fight wage theft in California as forced arbitration and class action waivers cumulatively gut private enforcement. As the United States Supreme Court found recently, Federal Arbitration Act preemption does not require an employee to waive their entitlement to pursue representative claims on behalf of the state for PAGA civil penalties in a civil court. (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1922-23.) The upshot of the *Viking River* decision is that representative PAGA claims brought on behalf of aggrieved employees cannot be compelled to mandatory arbitration; only the representative plaintiff's individual PAGA claim can be forced to arbitration.

While plaintiff-attorneys can count this result as a success for California's workers, the threat still looms. I suggest that we view the recent PAGA amendments as a re-set, not a win or loss. The plaintiff's bar is getting a second chance here, when we were on the threshold of losing PAGA altogether.

Most of the PAGA amendments went immediately into effect as of June 19, 2024 and are not retroactive. This means for a time there are two PAGAs – the original PAGA covering cases filed before June 19, 2024, and the amended version covering cases filed and notices submitted after June 19, 2024. The revamped cure processes are effective October 1, 2024 – ostensively to give the Labor Commissioner and the courts time to set up to handle these new procedures.

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Standing narrowed

The new PAGA amendments include an abrogation of *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, a tough but necessary concession by the plaintiff's bar. In *Huff,* the court held that an aggrieved employee could pursue civil penalties under PAGA for violations the representative plaintiff had not suffered as long as that employee suffered at least one qualifying violation. Under Labor Code (all references are to the Labor Code unless otherwise noted) section 2699, subdivision (c)(1), aggrieved employees must have "personally suffered each of the violations alleged during the period prescribed under Section 340 of the Code of Civil Procedure."

There is an important exception under section 2699, subdivision (c)(2) for certain qualifying non-profit legal aid organizations that allows them to assert violations not suffered by the representative plaintiff, preserving *Huff* for qualified non-profits only. There are specific restrictions for non-profit legal aid organizations to use this provision, for example, having litigated PAGA actions for more than five years, so carefully read this subsection. This may make private law firms eager to co-counsel with non-profit organizations, but if this exception is even *perceived* to be abused, it is likely that the Legislature will take action to curb or eliminate this carefully preserved privilege.

Promotes employer compliance

The amendments contain provisions designed to encourage employer compliance with the law.

Before filing a lawsuit under the PAGA, the representative aggrieved employee must submit a code-complaint notice to the California Labor & Workforce Development Agency ("LWDA") and serve a copy on the employer. Pre-litigation, workers also have the right to seek copies of employment records under sections 226, 432, and 1198.5.

If an employer "has taken all reasonable steps to be in compliance" with alleged violations before receiving a PAGA notice or request for records under the Labor Code, penalties are reduced to no more than 15%. The meaning of "all reasonable steps" includes *but is not limited* to an employer who: "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." (§ 2699, subd. (g)(2).)

The totality of the circumstances is considered to determine if the employer's conduct was reasonable, including, but not limited to, "the size and resources available to the employer, and the nature, severity and duration of the alleged violations." (*Ibid*.) This reduction to no more than 15% of the civil penalty applies only if the employer's conduct was not "malicious, fraudulent or oppressive." (§ 2699, subd. (g)(3).)

After notice to the LWDA by an aggrieved employee or a request for employment records under the Labor Code, the civil penalty will be no more than 30% when the employer "has taken all reasonable steps to prospectively be in compliance with all provisions identified in the notice." (§ 2699, subd. (h)(1).) Again, this reduction to no more than 30% of the civil penalty applies only if the employer's conduct was not "malicious, fraudulent or oppressive." (§ 2699, subd. (h)(3).)

Restructured penalties

Most of the changes to default penalties involve section 226 claims for inaccurate wage statements. Cases under this code section were the poster child for the PAGA repeal folks. Here, the concession is for a maximum $25 per pay period civil penalty if the employee can: (1) "promptly and easily determine from the wage statement alone the accurate information" or (2) "the employee would not be confused or misled about the correct identity of their employer or, if their employer is a farm labor contractor, the legal entity that secured the services of that employer." (§ 2699, subd. (f)(2)(A)(i).)

The defense bar often argued "stacking" was not allowed under the PAGA. Stacking is a defense concept where there are multiple violations that could trigger civil penalties. Under the PAGA amendments, the only limitation placed on so-called stacking occurs where there are derivative civil penalties. For example, where an unpaid wage claim also triggers violations under section 226 (inaccurate wage statements) and 203 (late payment of wages earned at separation). These derivative penalties now cannot be assessed for violations under sections 201, 202 and 203 that are "in addition to the civil penalty collected by that aggrieved employee for the underlying unpaid wage violation." (§ 2699, subd.(i).) The same applies to section 204 if the violation is "neither willful nor intentional" and section 226 if the violation is "neither knowing or intentional nor a failure to provide a wage statement…" (*Ibid*.)

Also added are limitations on civil penalties for "an isolated, nonrecurring event that did not exceed beyond the lesser of 30 consecutive days or four consecutive pay periods." (§ 2699, subd. (f)(2)(A)(ii).) If an employer meets its burden of proof here, the civil penalty is $50 per pay period.

The higher default $200 per pay period civil penalty is expanded to include instances where a court finds "the employer's conduct giving rise to the violation was malicious, fraudulent, or oppressive." (§ 2699, subd. (f)(2)(B)(ii).) This is in addition to demonstrating that either the LWDA or a court found within the last five years that the violation was unlawful. (§ 2699, subd. (f)(2)(B)(i).)

The amendments expressly provide judicial discretion to go above or below the cap to avoid an unjust outcome. (§ 2699, subd.(e)(2).)

Improvements to enforcement

A significant win here is the power to seek injunctive relief. (§ 2699, subd. (k)(1).) At times, we see employers continue

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violating the law after cases settle or even go to trial when employers view civil penalties as a cost of doing business. Prior to this amendment, for example, there was no mechanism to require employers to reclassify workers as employees rather than independent contractors. Now courts are empowered to change workplaces to curb future violations.

Also noteworthy is the increase in civil penalties allocated to the aggrieved employees up from 25% to 35%. One of the major criticisms we see is that employees get small checks in PAGA cases, while the attorneys get large checks. This narrative is misleading as PAGA is designed for the lion's share of the collected penalties to go to the state. This increase is a solid benefit to California's workers.

For litigators, the recent holding in *Estrada v. Royalty Carpet Mills* (2024) 15 Cal.5th 582 is now codified: "The superior court may limit the evidence to be presented at trial or otherwise limit the scope of any claim filed pursuant to this part to ensure that the claim can be effectively tried." (§ 2699, subd. (p).) Importantly, no manageability requirement was added to PAGA.

Right to cure

The biggest change is the process for curing violations. New sections have been added to the list of curable violations: 226 (wage statements), 226.7 (meal and rest periods), 227 (improper withholdings), 227.3 (independent contractors), 510 (overtime), 513 (make-up work time), 1194 (unpaid wages), 1197 (minimum wage), 1197.1 (liquidated damages), 2800 (indemnification), 2802 (expense reimbursement). (§ 2699.5, subd.(a).)

Effective October 1, 2024, employers with fewer than 100 employees, may within 33 days of service of the notice submitted to the LWDA, submit a "confidential proposal" to cure one or more violations. (§ 2699.3, subd. (c)(2)(A).) The PAGA amendments lay out the cure procedure. (§ 2699.3, subd. (c)(2)(B).) Significantly, the cure must include the payment of unpaid wages and any owed liquidated damages or interest. (*Ibid*.) Notably, the LWDA can elect not to act upon a cure proposal. (*Ibid*.) The amendments limit the ability to use the cure process more than once in a 12-month period for the same violations. (§ 2699.3, subd. (d).)

For employers of 100 or more workers, after the commencement of a civil case and at the time of filing a responsive pleading or notice of appearance, the employer can initiate a cure process through the court. (§ 2699.3, subd. (f)(1)(A).) These employers may request an early evaluation conference ("EEC") and stay the case at the time of an initial appearance. (*Ibid*.) The purpose of the EEC is to attempt to resolve the case. (§ 2699.3, subd. (f)(1)(B).) At the time, the employer must state whether they intend to cure any or all violations. (§ 2699.3(f)(2).) Upon a showing of good cause, the court can deny an employer's request for an EEC. (§ 2699.3, subd. (f)(3).) Presumably, if an employer does not intend to cure, the court can deny the request. The EEC must take place within 70 days of the court issuing the order. (§ 2699.3, subd. (f)(3)(A).) The evaluator or plaintiff can disagree that the violations have been cured. (§ 2699.3, subd. (f)(9).) In that case, the court can request further briefing and evidence. (*Ibid*.) If you find yourself in the EEC process, it will be best practice to request the employer submit evidence to support the assertion of a cure.

Final thoughts

Moving forward, use the positives:

- The bill preserves PAGA as a vehicle for an employee to bring a representative action for civil penalties to enforce the Labor Code even where the employee has signed an arbitration agreement
- *Adolph v. Uber Technologies, Inc*. (2023) 14 Cal. 5th 1104 remains good law – standing remains even if an individual employee's claims are compelled to forced arbitration
- Co-counsel with qualified non-profits on righteous cases where it is critical to assert violations not suffered by your aggrieved employee
- Request injunctive relief and change workplaces
- Scrutinize the "reasonable steps" employers took to correct violations in discovery
- Even if your employer did not assert it corrected the violations, use the "reasonable steps" language in discovery to show the court why full penalties should be awarded
- Get to understand how to use the agency cure process for small employers to maximize recovery for aggrieved employees including unpaid wages and interest
- Educate courts on the early evaluation process and the burdens on employers to use it

A February 2024 report by the UCLA Labor Center highlighted the continued rampant levels of wage theft California workers face, with nearly 600,000 workers experiencing wage violations, totaling almost $2 billion in losses annually. Unfortunately, only $40 million, or 2% of those lost wages, are recovered through the Labor Commissioner.

It may sound like a cliché at this point but the threat to PAGA was very real. While some of the amendments might be viewed as a loss for workers, PAGA has been preserved as a tool to enforce California's wage theft laws and has been enhanced to encourage employer compliance. Use it wisely.

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