California Attorneys General Act is Overhauled

An overview for hospitals

Background

The Private Attorneys General Act (PAGA), enacted in 2004, allows a current or former employee to file a lawsuit on behalf of other employees against an employer for allegedly failing to comply with the labor code. Included is a punitive penalty structure of $100 and $200 or more per pay period per "aggrieved" employee that the plaintiff may recover along with attorney's fees and costs.

Since its inception, PAGA has generated a cottage industry of plaintiff attorneys suing employers over labor code violations, even technical ones, and forcing costly settlements. PAGA became a significant driver of costly wage and hour litigation in California. As a result, a coalition of non-profits, health care providers and businesses drafted a PAGA reform initiative that qualified for the November 2024 ballot. Proponents of PAGA strongly disagreed with the ballot initiative's approach, and negotiations among all stakeholders promptly ensued.

On June 18, Governor Gavin Newsom, Assembly Speaker Robert Rivas (D-Salinas), and Senate President pro Tempore Mike McGuire (D-Healdsburg) announced a legislative compromise that makes sweeping changes to PAGA intended to disincentivize the flurry of lawsuits while preserving aggrieved employees' ability to bring claims against employers who violate the law.

The PAGA reform package is contained in two bills, Assembly Bill (AB) 2288 (Kalra, D-San Jose) and Senate Bill (SB) 92 (Umberg, D-Santa Ana), both of which have urgency clauses and took immediate effect when the governor signed them on July 1. The PAGA reform provisions will apply to lawsuits brought on or after June 19, 2024.

Key Provisions

Representative Standing

Prior court decisions broadened the individual standing requirements for a PAGA claim, essentially allowing plaintiffs to bring a representative action for additional claims from which they did not personally suffer. AB 2288 preserves the ability for one plaintiff to bring a claim on behalf of others, so long as that plaintiff personally suffered the same labor code violations.

Reduction in PAGA Penalties

AB 2288 repeals the current PAGA civil penalty of $100 per pay period for the initial violation and $200 for subsequent violations, replacing it with a less punitive penalty structure. Specifically, the $100 penalty is no longer limited to the "initial violation" and may be further reduced under the following circumstances:

- Reduced to $50 per employee, per pay period, if the alleged violation "resulted from an isolated, non-recurring event" and the violation did not continue beyond the lesser of 30 consecutive days or four consecutive pay periods
- Reduced to $25 per employee, per pay period, for most wage statement violations alleged under Labor Code Section 226

AB 2288 limits application of the $200 penalty per pay period, previously applied to subsequent violations, to one of two situations. The first is when, within the five years preceding the alleged violation, the Labor and Workforce Development Agency (LWDA) or any court issued a finding or determination to the employer that its policy or practice giving rise to the violation is unlawful. The second is when a court determines that that the employer's conduct giving rise to the violation was malicious, fraudulent, or oppressive.

Lastly, aggrieved employees are now prohibited from "stacking" derivative penalties. This is particularly relevant to claims for unpaid wages where plaintiffs had been collecting penalties for all labor code violations that derived from the underlying claim. Moving forward, the plaintiff will be limited to one penalty.

Penalty Cap for Reasonable Steps

In addition to the penalty reductions for alleged violations, AB 2288 provides for further reductions if an employer has taken "all reasonable steps" to prevent the alleged violation from occurring.

The term "reasonable steps" is defined to include, but is not limited to, periodic payroll audits along with corrective actions if needed, distribution of lawful written policies related to the alleged violation, training supervisors on Labor Code compliance, and taking appropriate corrective action with supervisors.

The various penalty reductions are as follows:

- A penalty reduction of not more than 15%, when the employer took "reasonable steps" before receiving notice of an alleged violation
- A penalty reduction of not more than 30% when the employer took "reasonable steps" within 60 days after notice of an alleged violation

An employer's attempts to take "reasonable steps" must be evaluated by the "totality of the circumstances," taking into consideration the employer's size and resources and the nature, severity, and

duration of the alleged violation. However, the existence of a violation, despite employers' efforts, is not enough to establish that an employer failed to take reasonable steps.

Right to "Cure" Process for Alleged Violations

Under existing law, before an aggrieved employee may file a lawsuit under PAGA, they must first file a notice with the LWDA. The LWDA has a limited time to either investigate the claim or allow the aggrieved employee to proceed to court.

Existing law also provides for a limited and undefined "cure" provision that, in theory, was intended to give employers the chance to fix alleged Labor Code violations before the plaintiff sued. However, this mechanism was ineffective at quelling the number of PAGA claims that proceeded to court. AB 2288 and SB 92 collectively change the "cure" process by providing a meaningful process all employers may utilize to resolve PAGA claims expeditiously.

First, the term "cure" is defined to mean that the employer corrects the alleged violations and is in compliance with the relevant labor code statutes, and that each aggrieved employee is made whole. For claims of unpaid wages, an employee is "made whole" when the employee receives all unpaid wages plus 7% interest, any liquidated damages, and reasonable attorney's fees and costs.

Second, beginning October 1, 2024, the following right to cure process based on the employer size (outlined in SB 92) will take effect:

- Employers with more than 100 employees may file a request for stay and **early neutral evaluation** within the court, requiring the court to pause all discovery and responsive pleading deadlines. Through the evaluation process, employers have a structured means of resolving PAGA lawsuits in an expeditious manner.
- Employers with fewer than 100 employees may submit a confidential proposal to cure one or more of the alleged violations. This triggers a multi-step review process within the LWDA.

Lastly, SB 92 limits an employer's ability to utilize the right to cure process to one time in a 12-month period for violations of the same Labor Code provisions.

Judicial Discretion

In addition to the penalty reductions referenced above, courts will have discretion to reduce penalties even further than prescribed. Similarly, courts will have more authority to manage cases by limiting both the scope and evidence presented at trial.

Increase in Employee Share of Penalty

AB 2288 increases the employee's share of recovered penalties from 25% to 35%, and reduces the share distributed to the LWDA from 75% to 65%.

Next Steps for Hospitals

AB 2288 and SB 92 represent much-needed reform to a law that has incentivized costly lawsuits against employers without any relief to employers who either thought they were complying or promptly corrected the violations.

Although only time will tell as to whether these reforms bring meaningful results, hospitals should take proactive steps now to defend against PAGA lawsuits. These steps include auditing payroll on an annual basis, conducting periodic training on topics such as wage and hour compliance, updating and disseminating workplace policies, and correcting any discovered mistakes promptly.