

Publications

July 12, 2024 • Updates

PAGA Amendments Aim to Bring PAGA Litigation Under Control

California's Private Attorneys General Act ("PAGA") has undergone substantial, and arguably overdue, reform by way of dual legislative measures - Assembly Bill 2288 and Senate Bill 92. PAGA 2.0 will apply to PAGA civil complaints filed after June 19, 2024, as well as PAGA notices sent to the Labor & Workforce Development Agency (LWDA) after June 19, 2024.

PAGA 2.0 aims to reign in meritless PAGA claims with several initiatives. Perhaps most promising is the statute's new preemptive or post-notice compliance measures that, where instituted by employers, can substantially minimize penalties, even if the preventive measures don't fully remediate the violations. The new amendments also provide for expansive cure provisions, require PAGA plaintiffs to have actually suffered any violations they may allege, equip courts with inherent powers to manage PAGA claims, clarify a statute of limitations for PAGA actions, and prevent the stacking of penalties unless the violations are willful, knowing, or intentional.

Some background, approximately 20 years ago, California enacted PAGA, a statute permitting employees to act as deputized agents on behalf of the State's Department of Labor Standards Enforcement (DLSE). The statute was designed to reduce the overflow of wage-and-hour claims being submitted to the DLSE by allowing an aggrieved employee to bring an action on behalf of the State for alleged labor code violations against their employer. Critically, the statute allows for the recovery of employees' attorneys' fees (if successful) but does not have a reciprocal attorneys' fees provision for employers who prevail in a lawsuit. Attorneys quickly recognized that PAGA permits lawsuits on behalf of an entire workforce, without having to meet the statutory procedural requirements of a class action.

Unsurprisingly, PAGA quickly received the moniker as the "bounty hunter statute." The past twenty years have produced an ever-rising number of PAGA lawsuits with consequential ballooning settlements as well as a plethora of decisions with unpredictable and conflicting results.

In general, the past twenty years of litigation confirmed that PAGA is an unstable statute. Businesses should be prepared to utilize PAGA 2.0's new cure and conduct of compliance features, which should substantially decrease and could possibly negate PAGA claims

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and damages.

We consider the following modifications to the statute as key provisions.

1. Who can file a PAGA lawsuit?

- **Prior to Amendment:** A current or former employee did not need to personally experience the alleged labor code violations to bring the claims, as long as the employee experienced at least one of the alleged violations and at some point in time worked for the employer.
- **Current:** The plaintiff-employee will be required to have personally experienced any violation that the plaintiff-employee wants to pursue.

2. What is the Statute of Limitations on PAGA Claims:

- **Prior to Amendment:** Employees could submit claims on behalf of other employees who may have allegedly suffered the Labor Code violations past the applicable statute of limitations.
- **Current:** In order for an employee to pursue a claim, they must personally have encountered each alleged violation within one year of submitting a PAGA notice to the LWDA.

3. What kind of claims can be alleged?

- **Prior to Amendment:** In *Estrada v. Royalty Carpet Mills, Inc.*, the California Supreme Court held that trial courts lack the inherent authority to dismiss PAGA claims based on manageability.
- **Current:** Trial courts are now statutorily equipped with the authority to assess manageability and limit the scope of any PAGA claim, including the evidence presented at trial in support of such claims.

4. Caps on Penalties When Employer Takes “All Reasonable Steps to Comply:”

- **Prior to Amendment:** Employers were left to argue a good faith defense and seek an offset of penalties from judges who maintained discretion with respect to the PAGA penalties assessed.
- **Current:** New compliance provisions decrease potential penalties for employers who take reasonable steps to comply with the Labor Code. Examples of reasonable steps include conducting periodic payroll audits, disseminating lawful written policies, providing training on Labor Code and Wage Order compliance, and taking corrective action with regard to supervisors.
 - **Reasonable Steps at Compliance Before Receipt of a PAGA Notice or Request for Personnel Records:** If the employer takes all reasonable steps to comply with the California Labor Code before receiving a violation notice or a plaintiff-employee’s request for personnel records, but does not cure the alleged violations, the available penalties will be capped at 15% of the penalties sought.
 - **Reasonable Steps at Compliance Within 60 Days of PAGA Notice:** When an employer can demonstrate that it took reasonable steps to be in compliance within 60 days after it received the PAGA notice, but did not cure the alleged violations, the available penalties will be capped at 30% of the penalties sought.
 - **Reasonable Steps with Full Cure Within 60 Days of PAGA Notice:** An employer who can demonstrate full cure, as defined by statute (see below) with reasonable steps taken within 60 days of a PAGA notice, will not be

- required to pay a civil penalty for that violation.
- **Full Cure After 60 Days of PAGA Notice:** An employer who can demonstrate full cure, but not within 60 days of receiving a PAGA notice, will pay a civil penalty of no more than \$15 per employee per pay period for the statutory period.
- **What is considered a “Cure” for Unpaid Wages:** The new amendments provide that a “cure” must make the employee “whole.” This includes paying for the following: (1) any unpaid wages going back three years; (2) 7 percent interest on any unpaid wages; (3) liquidated damages as required by statute; and (4) “reasonable lodestar attorney’s fees and costs.”
- **What is considered a “cure” for wage statements:** The new amendments provide that an employer may cure a wage statement violation concerning the employer’s legal name and address by providing the aggrieved employees the correct information in “summary form.” For any other potential violations, the employer must provide three years of correct wage statements or access to a digital or computer-generated record of the same.

5. Penalty Stacking:

- **Prior to Amendment:** Employees could seek multiple penalties arising from the same underlying violation (e.g., an employee not paid overtime would have claims for unpaid overtime, inaccurate wage statements, failure to pay wages semi-monthly, failure to maintain accurate records, and failure to pay final wages).
- **Current:** Employees can no longer recover penalties for derivative claims for failure to timely pay wages, inaccurate wage statements, failure to pay wages semi-monthly, failure to maintain accurate records, and failure to pay final wages) unless the underpayment was willful or intentional, and, for wage statement claims, unless the violation was knowing or intentional.

6. Penalties:

- **Prior to Amendment:** Initial violation of \$100 per pay period (arguably per penalty) and \$200 for each “subsequent violation.”
- **Current:** The PAGA penalty will be \$100 per pay period per “each aggrieved employee,” unless specific exceptions apply:
 - For wage statement violations where the employee was not misled or would not have been confused, the penalty is \$25 per pay period per “each aggrieved employee.”
 - For isolated, nonrecurring events lasting less than 30 days or not spanning more than four pay periods, the penalty is \$50 per pay period per “each aggrieved employee.”
 - For violations deemed “malicious, fraudulent, or oppressive,” or if there’s a prior finding within the last five years of the employer committing the same violation by a court or agency, the penalty will be \$200 per pay period per “each aggrieved employee.”

7. Penalty Distribution:

- **Prior to Amendment:** Any penalties recovered under PAGA are allocated 75% to the Labor and Workforce Development Agency (LWDA) and 25% to the employees.
- **Current:** The distribution to the LWDA would decrease to 65%, while the distribution to the employees would increase to 35%.

8. Pay Period Clarification:

- **Prior to Amendment:** No difference between employers utilizing weekly, biweekly, or semi-monthly pay periods.
- **Current:** Employers with weekly pay periods will have their penalties halved, addressing the previous disparity where they incurred double the penalties compared to those who paid biweekly.

What Can (and Should) Employers Do?

Employers should conduct routine audits of wage and hour practices. Under the proposed PAGA amendments, this practice can negate or greatly decrease potential exposure to PAGA penalties. Employers should also be mindful that the receipt of either a records request or a PAGA letter triggers the timeline to correct potential violations and reduce exposure for any violations.

Polsinelli will be conducting a webinar discussing the above-referenced changes as well as PAGA's new compliance procedures on July 31, 2024. Register [here](#).