

BEWARE! The PAGA Saga Continues

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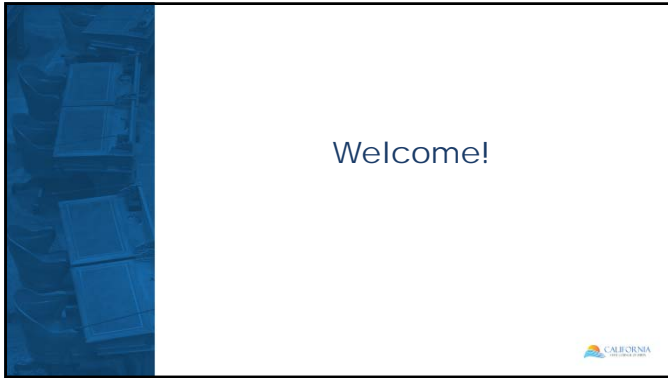
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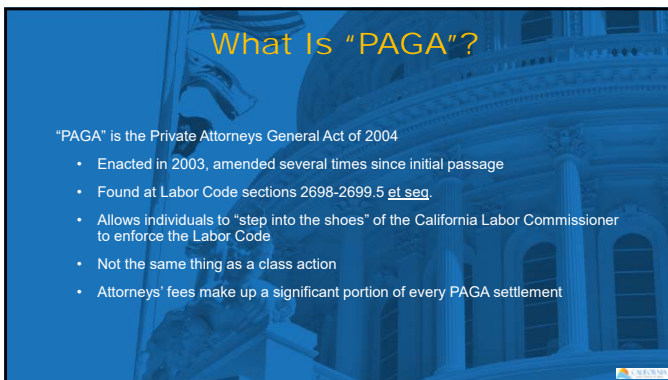
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Category 1 Claims

Category 1 claims are violations of the Labor Code identified in Labor Code section 2699.5

- Meal and rest break violations
- Most wage statement violations
- Failure to pay minimum wage or overtime
- Failure to reimburse expenses
- Failure to timely pay final wages and waiting time penalties

Category 2 Claims

Category 2 claims are violations of Labor Code section 6300 et seq.

- Related to the California Occupational Safety and Health Act (CalOSHA)
- Most often used in this manner to alert CalOSHA to health and safety violations
- An employee may not bring a civil action if CalOSHA issues a citation; if no citation is issued, the employee may ask the court for an order directing CalOSHA to cite the employer
- Excludes violations of Labor Code sections 6310 and 6311, which are Category 1 claims for retaliation related to reporting perceived health and safety issues

Category 3 Claims

Category 3 claims include all Labor Code violations not covered by Categories 1 and 2

- Most common claims are wage statement violations regarding the failure to provide inclusive dates of the pay period or the employer's legal name and address
- These claims are unique in that the employer may "cure" the defect prior to litigation to avoid PAGA penalties

Who Can Bring PAGA Claims?

"Aggrieved" employees may bring claims

- An "aggrieved" employee is any person who is or was employed by the alleged violator and who was subject to one or more alleged violations
- "Aggrieved" does not mean actually harmed (more on this issue a bit later...)
- Current development: The California Court of Appeal ruled that a plaintiff who settles individual claims may no longer bring a PAGA action because they are no longer "aggrieved"; the decision is on review to the California Supreme Court

What Is the Process for Bringing PAGA Claims?

An aggrieved employee must provide notice and exhaust their administrative remedies prior to filing a lawsuit

- All three categories of PAGA claims require the employee to give written notice to the Labor and Workforce Development Agency ("LWDA") through the LWDA's website and to the employer via certified mail
- The statute of limitations for PAGA claims is one year, which is tolled once the employee provides written notice to the LWDA
- The written notice must specify the claimed Labor Code violations and the applicable facts and theories

What Is the Process for Bringing PAGA Claims? (cont.)

- For category 2 claims, the aggrieved employee must also send a notice to CalOSHA
- The LWDA has 65 days from the date of the filing date of the notice to respond to the notice if the LWDA declines to investigate or respond within 65 days, the aggrieved employee may pursue a lawsuit

How Should Employers Respond to a PAGA Notice?

A PAGA notice provides the employer valuable information and the opportunity to prepare for and defend against PAGA claims

- The notice provides up-front information to allow employers to evaluate the claims prior to expensive litigation
- Employers should work with their legal counsel to review the notice for technical defects and establish the applicable timelines for response
- In the case of the wage statement violations in Category 3, the notice gives the employer the opportunity to cure the defects

How Do Employers Cure Defects?

Employers have a limited time to cure certain wage statement defects

- Employers must cure within 33 days of the postmark of the PAGA notice (save the envelope!)
- To cure the violations and avoid penalties, employers must provide fully compliant itemized statements to all aggrieved employees, not just the employee who sent the notice
- Employers must provide fully compliant wage statements for each pay period, for the three-year period immediately prior to the date of the PAGA notice

How Do Employers Cure Defects? (cont.)

- Once cured, the employer must inform the LWDA and demonstrate that the employer provided a fully compliant, itemized wage statement to each aggrieved employee for the time period required
- Employers may only cure wage statement defects once in a 12-month period, regardless of the location of the worksite

PAGA Actions Are Lucrative...

The financial benefits of PAGA claims are attractive to plaintiffs' counsel

- PAGA allows employees to keep 25% of the civil penalties recovered
- If an underlying Labor Code provision already has a civil penalty, the employee can seek to collect that penalty; if there is no proscribed penalty for the violation, the PAGA penalty is \$100 per employee per pay period for the "initial" violation and \$200 per employee per pay period for each subsequent violation (these penalties can really add up!)
- PAGA authorizes an award of costs and "reasonable" attorneys' fees to the employee if the employee is successful (but not to the employer!)

PAGA Actions Are Lucrative... (cont.)

- A bit of a silver lining: courts have discretion to reduce the penalties, or decline to award them at all, based on the circumstances of the case and the employer's commitment to compliance (but don't count on it...)

PAGA Liability

PAGA liability is relatively easy to establish

- An aggrieved employee does not actually have to be harmed by the violation to bring the action
- PAGA does not require a showing that the violations are "knowing and intentional"
- Liability can be based on inadvertent technical mistakes

PAGA Liability (cont.)

- An employee who can demonstrate one Labor Code violation covered by PAGA may seek other PAGA penalties for any type of violation, even if that employee is not affected by the other violations
- A recent court decision suggests that "any person acting on behalf of an employer" who causes overtime or minimum wage violations may be personally liable for PAGA penalties

Representative Versus Class Actions

Although PAGA is a "representative" action, it is not the same as a class action

- PAGA claims do not require class certification, which can be a significant defense for employers in class actions
- Although class action waivers are permissible, employees cannot waive future PAGA claims
- Similarly, PAGA claims are non-arbitrable

Resolving PAGA Claims

PAGA actions rarely go to trial

- PAGA actions almost always are resolved in mediation
- Preparation for and appearance at a mediation is often costly
- Settlements of filed PAGA actions require court approval and must be transmitted to the LWDA at the time of submission to the court (yes, that puts the employer on the LWDA's radar)

What Can Employers Do to Avoid PAGA claims?

- Conduct regular wage-hour audits with counsel
- Review wage statements to ensure they meet the technical requirements of Labor Code section 226
- Review compensation practices (regular rate of pay, overtime calculations, piece rate compensation, etc.)
- Update timekeeping practices
- Train management on wage-hour compliance
- Work with SHRM and other associations to encourage PAGA amendments



Questions/Comments



Upcoming 2019 Shaw Law Group, PC Employment Law Seminars

Equal Employment Opportunity: Workplace Rights and Responsibilities (Staff and Supervisors)
May 14 – webinar
August 28 – webinar
October 10 – Sacramento (in person)
December 5 – webinar

Equal Employment Opportunity: Workplace Rights and Responsibilities (Staff Only)
May 30 – webinar
August 20 – webinar
November 14 – webinar

Workplace Violence Prevention (Including Active Shooters)
April 24 – Seminar (in person)
June 4 – webinar

California Wage-Hour Compliance: What You Don't Know Will Hurt You!
June 12 – webinar

Conducting Effective Internal Investigations: Mock Investigation
July 18 – Sacramento (in person)

"Train-the-Trainer": EEO Training for Supervisors and Staff
September 10 – Sacramento (in person)

Key 2020 California Employee Handbook Changes
December 13 – webinar

Annual Employment Law Update (2020)
December 3 – Sacramento (in person)
December 11 – Sacramento (in person)
January 9, 2020 – webinar

Thank You!



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