

# Employee Benefit ■ Plan Review

## Reform of Private Attorneys' General Act Could Mean Sweet Relief for the Professional Employer Organization Industry: 3 Steps to Save Up to 85% on California Litigation Costs

BY JOHN M. POLSON AND BENJAMIN M. EBBINK

There are three actions the professional employer organization industry (PEO) and its customers can take to save up to 85% in California litigation costs thanks to a recent legislative compromise. Anyone doing business in California is no doubt familiar with the Private Attorneys' General Act – or PAGA – the scariest four-letter word in the state for employers. What you might not know is that a recent overhaul will tame the state's most vicious law and provide much-needed relief to PEOs and their customers.

Specifically, employers who take “reasonable steps” to comply with California law before a PAGA claim is filed can earn up to an 85% discount in penalties. This helps both PEOs who have employees in California and PEO customers with worksite employees in the state. The benefit of PEO customers earning the additional protection is obvious.

### WHAT'S GOING ON?

In sum, a recent legislative overhaul will limit the types of employees who can bring PAGA claims, give employers a better chance

to cure mistakes, reduce possible penalties, and boost procedural mechanisms that will reduce claims in court.

But the focus of this article is on the most exciting prospect for PEOs: if PEO customers take “all reasonable steps” to comply with law ahead of time, they can achieve significant penalty reductions for any alleged violations of the law, reducing risk for customers and PEOs.

### “ALL REASONABLE STEPS”

Under the reform, PAGA penalties can be significantly reduced if employers take certain preventative measures to comply with the law before they receive a PAGA notice or employee records request.

Specifically, if employers take “all reasonable steps” to be in compliance with the law ahead of time, the civil penalty that may be recovered shall be no more than 15% of the \$100 penalty found in PAGA or other penalties referenced in the law. This provides for a potential 85% reduction (or more) in penalties for employers who engage in reasonable steps of compliance prior to a dispute arising.

The reform legislation also provides a similar penalty reduction (not more than 30%) for

employers that take similar reasonable steps to be in compliance of the law within 60 days after receiving a PAGA notice.

The proposed revision defines “all reasonable steps” to include:

- Disseminating lawful written policies;
- Training supervisors on the applicable law;
- Taking appropriate corrective action with supervisors; and
- Conducting periodic payroll audits and taking action in response.

This means that you should consider next steps in encouraging customers to take the “reasonable steps” and/or assist them in doing so. The PEO might decide to play a prominent role depending on the PEO’s situation. Regardless, the focus of discussion is the following three things.

### 1. TRAINING PROGRAMS AND WRITTEN POLICIES

Creating written policies and offering workplace training is right in the wheelhouse of many PEOs.

- You will not have off-the-shelf resources for all of the areas of the law that are most critical when it comes to PAGA (especially with regard to some wage and hour issues), so work with your PEO counsel to develop those.
- These written policies or training programs will be strictly scrutinized by plaintiffs’ counsel who will be stinging at the dilution of their favorite weapon. They will soon be looking to defeat any potential penalty reductions by claiming employers did not meet the “all reasonable steps” standard. Do not give them an unearned victory. Make sure your materials are up to date.

- Given the risk of training falling short of what a plaintiff’s counsel might believe the law requires, some PEOs may choose to outsource the training. Of course, many PEOs already outsource a wide variety of training programs.
- Given the role AI will play in the creation and updating of video based training in the future, the PEO may have an easier road to taking on the training aspect internally. Obviously, the content will need to be highly scrutinized by expert PAGA counsel both initially and ongoing basis.

### 2. ENCOURAGE YOUR CUSTOMERS TO TAKE APPROPRIATE CORRECTIVE ACTION REGARDING SUPERVISORS

The potential “reasonable step” of taking corrective action regarding supervisors behaving badly will generally be a customer responsibility. For example, a customer that learns that a supervisor is instructing employees not to take meal or rest periods will potentially be responsible for taking appropriate corrective measures. But that does not mean you play no role here at all.

- Your customer service agreement might include language regarding such corrective measures. However, PEO counsel will have some thoughts on the issue of creating a misperception of “control” on the PEO side.
- You should at least consider instituting policies, procedures, and communications to ensure your customers understand the benefit of taking such “reasonable steps” in anticipation of the possibility of PAGA litigation.

### 3. ASSIST WITH PAYROLL (AND OTHER) AUDITS

Perhaps the area of greatest concern for PEOs may involve whether and how to assist customers in payroll and other audits to potentially reduce penalties under the reformed PAGA. A number of potential considerations could arise, including the following:

- If you use your own personnel to conduct such audits, you may uncover issues over which you have little power, short of terminating your relationship with the customer. And if you conduct such audits, you may be drawn into litigation through subpoenas and requests for document production if a plaintiff contests the actions a customer took in response (even after the customer is no longer a customer of your PEO).
- You may consider using outside third parties to conduct audits, but this could also raise potential issues. For example, you may want the outside consultant to provide some type of certification to provide assurance that the audit was conducted competently and any identified issues were addressed.
- Some customers would be well-served have counsel involved in audits to take advantage of the attorney-client privilege for aspects of the audit. This is something PEOs should take up with their counsel. It is a very complicated aspect of the audit piece.

As always, PEOs will want to be cognizant of potential joint liability issues when providing such services. 🌀

The authors, attorneys with Fisher Phillips, may be contacted at [jpolson@fisherphillips.com](mailto:jpolson@fisherphillips.com) and [bebbink@fisherphillips.com](mailto:bebbink@fisherphillips.com), respectively.

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