



California Breaking News: 10 Biggest Potential Changes for Employers if PAGA Reform Becomes Law

Insights

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California Governor Gavin Newsom just unveiled groundbreaking proposed legislation that would provide significant reform to California Private Attorneys' General Act – also known as PAGA – and offer much-needed relief to employers. If the legislation is passed, we will see an overhaul that would limit the types of employees who could bring claims, give employers a better chance to cure mistakes, reduce possible penalties, and boost procedural mechanisms that would reduce claims in court. What can you expect in the coming weeks – and what are the 10 biggest changes included in this proposed PAGA reform?

What is Driving This Change?

The proposed legislation, found in Assembly Bill 2288 and Senate Bill 92, results from extended months' long discussions between the Newsom Administration, labor advocates and organizations, and business groups. They are acting in response to a PAGA-related proposition that could appear on the November 2024 ballot and essentially wipe the law off the books. Many lawmakers now recognize that they might be able to salvage some of PAGA's provisions – even if watered down or otherwise scaled back – if they are able to pass this compromise bill.

The proposed PAGA reform bill will be sent to the California Legislature – where time is of the essence to pass of the bill. The deadline for the voter proposition to be withdrawn from the ballot is June 27.

10 Biggest PAGA Reform Provisions

The 10 biggest provisions of the proposed legislation are summarized here:

1. Significant Reduction Of Possible Penalties

PAGA currently provides a civil penalty under PAGA of \$100 “for each aggrieved employee per pay period for the initial violation” of certain provisions of the California Labor Code. Employers have expressed concern over the amount of the penalty and how it fails to take into consideration good-faith attempts to remain in compliance with applicable California wage and hour law.

The proposed legislation provides relief by removing the “term “initial” and alternatively applying a \$100 per pay period penalty for all violations subject to various reductions including, but not limited, to the following:

- If prior to receiving a records request from the employee or an administrative complaint filed with the California Labor Workforce Development Agency (LWDA) relating to the aggrieved employee, the employer takes “all reasonable steps” to be in compliance with the Labor Code sections identified in the request/complaint, the civil penalty that may be recovered shall be “no more than 15%” of the \$100 penalty found in California *Labor Code* 2699(f) or other penalties referenced in California *Labor Code* § 2699(a). This provides for an up to 85% reduction in penalties for employers who engage in reasonable steps of compliance prior to a dispute arising.
- The proposed legislation goes further in providing relief to employers who, after receiving a PAGA lawsuit, commence reasonable steps to comply with the law. Specifically, the proposed legislation provides for a limitation of “no more than 30%” to proposed penalties when an employee has taken “all reasonable steps to prospectively be in compliance with the law” upon receipt of the lawsuit. This provides for an up to 70% reduction in penalties for employers who seek to remedy any potential issues following receipt of a lawsuit.
- These reductions are in addition to a reduction from “\$100 per aggrieved employee per pay period” to “\$50 per aggrieved employee per pay period” if the alleged violation “resulted from an isolated, non-recurring event that did not extend beyond the lesser of 30 consecutive days or four consecutive pay periods” for the aggrieved employee. This provision is intended to address, in part, instances where an aggrieved employee experiences sporadic instances of meal period non-compliance, rest-period non-compliance and/or an instance where there was an anomaly in payroll processing for less than four consecutive pay periods.
- “All reasonable steps” may include, but are not limited to, either “an audit of the alleged violations and taking action in response to the results of the audit, dissemination of lawful written policies as to the alleged violation, training of supervisors on applicable Labor Code and Wage Order compliance, and/or taking correct action with regard to supervisors.” It is important to note that employers seeking to have the penalties reduced to no more than 15% must have reasonable steps in place prior to receiving the records request or LWDA notice. An employer’s attempts to take reasonable steps shall be evaluated by a “totality of the circumstances and take into consideration the size and resources available to the employer, and the nature, severity and duration of the alleged violation.” The existence of a violation, despite steps taken, is insufficient to establish that an employer failed to take all reasonable steps.

2. Beneficial Clarification On When Heightened Penalties Are Permitted

PAGA currently allows for a PAGA penalty of \$200 per pay period for each “subsequent violation.” The term “subsequent violation” is not currently defined, but the Ninth Circuit Court of Appeals ruled in 2021 that subsequent violations occur only after an employer receives “notice” from a court or agency that a practice is unlawful.

The term “notice” has been subject to interpretation. The proposed legislation eliminates the “initial/subsequent” dichotomy and states that a \$200 per pay period penalty shall be assessed when either any agency or court “within the five years preceding the alleged violation...has issued a finding or determination to the employer that its policy or practice giving rise to the violation was unlawful” or if the court finds the employer’s conduct was malicious, fraudulent or oppressive. Important about this heightened penalty is that the penalty reductions identified above are not available when a court issues heightened penalties.

3. Reduction In Civil Penalties For Cured Violations

In addition to reducing PAGA penalties, the proposed legislation also eliminates or reduces related civil penalties for employers that cure violations. Employers who undertake the required “reasonable steps” shall not be required to pay a civil penalty for an underlying violation.

Likewise, an employer who cures a violation of California Labor Code Section 226(a) shall likely not be required to pay a civil penalty. In all other circumstances where an employer properly cures utilizing the various processes under the proposed legislation but does not take the described “reasonable steps,” any civil penalty shall be no more than \$15 per employee per pay period during the applicable statute of limitations. This provides relief and incentive for employers to possibly cure various violations.

4. Additional Limitations Of Potential Penalties For Weekly Payroll

One of the inequities of PAGA has historically been that employers with weekly payroll calendars were penalized twice of much as those employers with bi-weekly payroll calendars even though the actual frequency of violations were the same. The inequities arose from the fact that PAGA penalties are based upon the number of pay periods as opposed to being tied directly to the frequency of underlying violations.

The proposed legislation provides much needed relief to these employers by reducing by one-half the penalties if the employees’ regular pay period is weekly rather than bi-weekly or semi-monthly.

5. Substantive Limitation On Standing

A 2018 California Court of Appeal case found that a PAGA plaintiff had standing to bring claims on behalf of others for alleged Labor Code violations that they themselves never suffered, as long as the plaintiff suffered at least one Labor Code violation. This decision was viewed as expanding the breadth of standing that an individual bringing a PAGA lawsuit could have. For example, an individual who only experienced meal period violations, for example, could also seek penalties for those individuals that were subject to overtime pay violations.

The proposed legislation limits an individual standing to allowing pursuit of relief for only those employees “against whom a violation of the same code provision was committed.” This means that

the employee personally suffered the same purported violations as other alleged aggrieved employees.

6. Empowering Courts To Limit Scope Of PAGA Claims Prior To Trial

The California Supreme Court issued a decision earlier this year that found that a trial court could not dismiss an entire PAGA lawsuit on “manageability” grounds. Manageability is factor in class action certification, where courts assess whether the common issues in a case predominate over individual issues and whether a class action is a superior method of adjudication compared to individual lawsuits. The court found that manageability could not be applied in PAGA, in part, because the statute did not expressly discuss issues pertaining to manageability. The court provided some limited modicum of relief to employers on challenging the scope of PAGA claims, but additional left many questions unanswered.

The proposed legislation responds to this decision by codifying a trial court’s ability to both limit evidence at trial and, more importantly, “limit the scope of any claim pursuant to this part to ensure that the claim can be effectively tried.” The inclusion of this code section now allows a procedural mechanism to allow employers, prior to trial, to motion the court to seek limitations of the scope of the aggrieved employee population.

7. Preclusion Of Various Derivative Penalties

The proposed legislation contains language prohibiting an employee from seeking to combine PAGA penalties for violations of California Labor Code Sections 201, 202, 203 and violations of California Labor Code Section 204 that is neither willful or intentional, and/or a violation of California Labor Code section 226 that is neither knowing or intentional nor a failure to provide a wage statement. This curbs attempts in PAGA litigation to double-dip or combine the number of penalties that are sought in litigation.

8. Separate Cure Processes For Small and Large Employers

The proposed legislation creates new cure processes for small and large employers.

- Within 33 days of receipt of a notice from the LWDA, an employer with fewer than 100 employees in total during the period covered by the notice may submit a confidential proposal to cure or more of the alleged violations. Employers seeking to pursue curing, and possible relief resulting therefrom, will undergo a multi-step review process with the LWDA. All communications as part of this process are intended to be privileged settlement communications that could not be introduced in court.
- Employers with 100 or more employees during the relevant time period will be entitled to seek an early evaluation conference in court once the PAGA lawsuit is filed. The employer will file an application indicating whether it intends to cure any or all of the alleged violations and the

process it has/shall undertake. Similar to the small employer cure review process, the proposed legislation provides a multi-step process for a civil court's review of a large employer's cure process.

The actions an employer must undertake in order to "cure" is expanded under the proposed legislation and make require the employer to pay any owed unpaid wages "due under the underlying statutes specified in the [LWDA] notice dating back three years from the date of the notice" and other relief described below. There are also amended cure provisions where the aggrieved employee alleges a violation of California's itemized paystub requirements.

9. No Retroactivity

The reduced penalties set forth in the reform measure will not apply to any pending litigation matters or where notice was given to the LWDA prior to June 19, 2024.

10. Increased Penalties and Hurdles for Employers

The reform measure also increases certain penalties and precludes employers from gaining the benefits of amendments based on certain conduct. For example:

- **Exceptions To Penalty Reduction:** Although the proposed legislation provides multiple avenues for reduction of penalties and provides discretion to a trial court to award a lesser amount, the proposed legislation allows a court to refuse to apply the limitations if the facts and circumstances of a case warrant or to do otherwise would be unjust, arbitrary, oppressive, or confiscatory. The language in the proposed legislation appears to be intended to preclude, at least in part, employers who engage in significant wage theft from taking advantage of the limitations.
- **Non-Profit Legal Aid Organizations Can Bring Claims For Employees:** The proposed legislation allows for certain non-profit legal aid organizations to file PAGA lawsuits on behalf of aggrieved employees. They can also serve as counsel of record on behalf of one or more current or former employees against whom one or more of the alleged violations were committed. The non-profit itself shall have no standing in the litigation.
- **Injunctive Relief:** The proposed legislation permits an aggrieved employee to seek injunctive relief in PAGA litigation.
- **Attorneys' Fees And Costs Possible In Response To "Cure":** If an employer seeks to utilize the cure provisions under PAGA for wage violations, an employee will now be entitled reasonable lodestar attorneys' fees and costs to be determined by an agency or court, even when a cure is proper and civil litigation is avoided.
- **Modification Of Penalty Allocation:** The proposed legislation modifies the split of distribution of awards of settlement funds from a 75%/25% split between the state and aggrieved employees to a 65%/35% split between the two entities.

What Should You Do?

Employers should monitor the legislation to keep track of whether these groundbreaking changes become law. You should immediately commence processes and take “reasonable steps” for your organization to avail yourselves of these welcome changes. This includes updating your handbook, conducting audits, and training your employees. You should also immediately consult your legal counsel to ensure that the processes are consistent with legal obligations.

We will continue to monitor these fast-moving developments and provide updates as necessary, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions about PAGA litigation, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [our California offices](#).

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