Podcast

Amendments Alleviate Not Eliminate Employer PAGA Burdens

By Lara P. Besser & Eric J. Gitig

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Details

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"PAGA is a statute that's not employer-friendly, but one of the benefits of this last year is that we had some amendments come through that did, for lack of a better phrase, throw employers a little bit of a bone when it came to dealing with PAGA cases. One benefit is an expanded ability to cure labor code violations. The other involves arbitration and our ability to fight these claims and not just have to wait to trial to do it."

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INTRO

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CONTENT

Eric J. Gitig
Principal, Los Angeles

I'm Eric Gitig, and I'm here with Lara Besser. We are on the Jackson Lewis California Class and PAGA Action Resource Group. We are here today to talk about PAGA. PAGA is one of the least just and fair laws that employers are dealing with today in California. It poses a number of problems for California employers. Despite the new amendments, which we're going to talk about from June 2024, they're still very problematic for employers.

Laura, do you want to start talking about the amendments a little bit?

Lara P. Besser
Principal, San Diego

Sure, thanks, Eric. I understand the PAGA is a statute that's not employer-friendly, but one of the benefits of this last year is that we had some amendments come

through that did throw employers a little bit of a bone when it came to dealing with PAGA cases.

One of the benefits that we have seen from these new PAGA amendments is an expanded ability to cure Labor Code violations. The new amendments treat the ability to cure Labor Code violations differently based on the employer size. The idea behind it is that the legislature was trying to give smaller employers a leg up and be able to defend against these PAGA claims. So, smaller employers may need less than 100 employees during the putative PAGA period, which is one year and 65 days prior to filing the PAGA complaint. Those smaller employers are now able to cure any Labor Code violation that they want to. The process of doing so is to be brought up through the LWDA, the Labor and Workforce Development Agency, by filing a confidential proposed notice of a cure and walking the LWDA through how they are going to cure these alleged violations. So now, the one benefit is they can cure any Labor Code violation as opposed to previously, it was just wage statement violations.

Larger employers, those with more than 100 employees, are also able to avail themselves of the cure process. The mechanism is just a little bit different. Now, they have to go through an early neutral evaluation conference, present to a judge or a magistrate how they are proposing to cure and have that blessed by the magistrate or the judge prior to implementing that. That's one of the upsides to the PAGA amendments.

Eric, I think you might want to talk a little bit about penalties.

Gitig

The other potential benefit for employers is that there were some penalty caps imposed. Prior to the amendments, the civil penalties that employers could face were either $100 or $200 per employee per pay period. Now, there's the option to cap these penalties at 15 % or 30 % based on showing that you took all reasonable steps to comply with the Labor Code. The 15 % cap is if you took reasonable steps before getting notice of a PAGA action. The 30 % cap is if you have a plan in place after receiving notice that a PAGA notice was filed against you. You are going to be taking all reasonable steps to comply with the code with respect to the allegations in the PAGA notice. What ‘all reasonable steps’ means is up for debate. That's something we expect to see a lot of litigation on in the next year and probably longer. The Labor Code does give some examples of reasonable steps. It's a non-exhaustive list. It's going to really come down to the judge as to whether those caps are going to be put into place. The four things that the Labor Code does mention are an audit of time and payroll records, having compliant written policies, having manager training of the relevant Labor Code provisions and disciplining supervisors and managers who may have a hand in causing Labor Code violations. When these are going to come into play and at what point in a PAGA case, we don't know.

There are some pros and cons, obviously, to trying to take all reasonable steps in terms of an attorney-client privilege issue. That's something that if you do get a PAGA notice or you do have concerns that there are Labor Code violations, we strongly recommend talking to your attorney or your in-house counsel to see what can be done to cap your penalties, either in a PAGA case going forward or one that is currently happening. A 15 % cap is obviously a huge potential benefit for employers.

Laura, do you want to talk about some other benefits of the PAGA amendments?

Besser

Sure, thanks, Eric. The main benefit is the standing requirement. Prior to the PAGA amendments, standing was kind of in flux. Standing meaning whether or not an employee actually has to suffer a Labor Code violation to bring a PAGA claim regarding that violation. Previously, an employee could have been an exempt employee and trying to represent non-exempt employees with their meal and respirate claims, things of that nature. Many courts were allowing cases like that to proceed.

Now PAGA has been amended to require the employees to actually have suffered a Labor Code violation to represent a claim on a representative basis, which is a significant improvement for the employers. Because now the employees can't just bring an amorphous claim that covers all potential Labor Code violations. They actually have to have suffered a violation.

Gitig

The fact that you have this standing requirement, or the fact that I should say that you didn't have the standing requirement prior to the amendment, says just about everything you need to know about PAGA and doing business in the state of California. I've seen despite the new amendments, you still have some attorneys who are sending you these PAGA notices with 27 alleged violations in them. Some of them are when it comes to the actual limiting the complaints for standing purposes. What we expect to see going forward is employers and plaintiffs pushing the limits of these amendments and finding out when these potential benefits to employers are going to come into play. So, for example, the standing requirement, is that something you're going to be able to make a motion for early on in the case if there's a standing issue? Is it something you're going to have to wait until trial? Manageability is also something that was covered in the amendments. Is that something that's going to have to wait until the time of trial, or is it something that you'll be able to make a motion to help limit discovery? These are things that we expect to see litigation on in the year ahead.

Besser

Right, Eric. Another thing to keep in mind too is the impact of arbitration, the employer's ability to compel arbitration in light of the PAGA amendments. What it appears to be is that employers are going to have to choose whether or not they're going to avail themselves of the cure process; these larger employers can go through the early neutral evaluation process as opposed to going through and getting the stay on arbitration.

Several courts have already indicated that if an employer is going to avail themselves of that N & E process, then they are availing themselves of the forum, and they're waiving their right to be able to compel arbitration. So, again, that N & E process is where an employer can try to cure or bring to the judge or the magistrate their Labor Code violations, they allege the Labor Code violations of their defenses and try to resolve the claims and get a stay in the action until that happens. But if they do that, then many courts are saying they've availed themselves of the form and cannot compel

arbitration. It looks like it's going to be one or the other on that.

Gitig

I will talk a little bit about the state of PAGA versus arbitration in a little bit.

The other thing that I want to talk about in terms of the amendments is that we have seen an uptick in investigations by the LWDA in response to PAGA notices. So PAGA notices, they're filed. A plaintiff has to wait 65 days to file a lawsuit after that notice has been filed. Those 65 days give the LWDA time to decide whether it wants to investigate on its own. Prior to the amendments, I had never heard of, or maybe I'd heard of, one situation where the LWDA attempted to investigate. They ended up not in that situation, and the lawsuit proceeded. I've heard of at least three situations now with clients of the firm who are getting notices from the LWDA requesting records following a PAGA notice under their subpoena powers. These requests for records do not go back one year under the PAGA limitations period. They're going back three years. So, it's something to look out for.

The other thing to look out for is just the impact of these amendments on settlement values or case values in general. In theory, you have these penalty caps that should help employers who are looking to try to resolve these claims get out of them at a fairer value, if there is such a thing. They should also help in terms of employers who do want to fight these claims and hopefully give them some tools to fight it prior to trial. One of the big problems of PAGA pre-amendment is that you really didn't have any options to fight these claims prior to trial.

One other development in PAGA that happened was the ability to settle out PAGA cases, which took a step forward for employers. Wouldn't you say, Lara?

Besser

Right. Another case that came out this last year that we're going to look at the impact of going forward in 2025 is *Turrieta v. Lyft*. The court ruled that PAGA plaintiffs do not have an automatic right to intervene in, object to settlements or move to vacate judgments and other PAGA cases with overlapping claims. The significance of that case is that now it allows us to settle PAGA cases or alleged PAGA violations with more desirable opposing counsel without that risk of having to defend against Motions to Intervene or objections to settlement. That's one benefit that we're going to see a lot more this year. A lot more of the defense counsel is getting bolder in trying to find a better deal for their client to settle these PAGA cases.

Gitig

The flip side to that, Laura, is that a lot more plaintiff's attorneys filing on top of each other in the PAGA cases. Whereas before, you may have had people who are less willing to file on top of another plaintiff once there's litigation pending; now, there's just filing after filing because even the last to file knows that the company can negotiate with them directly if they're willing to be more reasonable. Sometimes, that works out in the employer's favor--you're able to negotiate with a more desirable settlement partner. However, for those employers who may want to fight or, depending on the plaintiff's firms, that are filing the claims, there can be some negative adverse impact of these multiple filings in a PAGA case.

One of the things I alluded to earlier that I want to touch on is the state of PAGA versus arbitration. There have been a lot of developments in the last few years since Viking *River Cruises, Inc. v. Moriana*, going forward to Adolph *v. Uber Technologies*. Before you were getting a lot of PAGA cases where we were trying to get them either dismissed at first or at least stayed pending a Motion to Compel arbitration. Now, we're looking at whether courts will even enforce arbitration agreements with respect to the individual components of a PAGA claim. A lot of plaintiffs are trying to get around this, and some courts are permitting it. In the year ahead, we do expect to see potentially some appellate decisions on that to clarify whether you can do that or not.

At least one good development in 2024 was the *Rodriguez v. Lawrence Equipment* case. A court ruled that if you do compel the individual component the individual component of a PAGA case to arbitration and then defend the claims in arbitration, that plaintiff will no longer have standing to pursue the PAGA claims on behalf of the representative group or the non-individual group. It is a strategy for employers. We see a lot of plaintiffs who were at a company for a week and a half, even if that, bringing these PAGA claims on behalf of all 5,000 or more employees in California. If you have somebody who was there for a limited amount of time or even not limited, but you're able to defend the claims, you're able to get out of that PAGA claim.

Besser

One thing that I've been seeing a lot, and I'm sure you have too, is that plaintiff counsels are now filing representative-only cases without seeking any individual penalties to try to circumvent that Rodriguez ruling and losing their standing. This is one thing that we're going to see more and the courts ruling on next year, seeing whether or not they can actually do that.

Gitig

In terms of closing thoughts, PAGA is still horrible and a bane on the existence of California employers. But for the first time, potentially, there may be some light in terms of the amendments, our ability to fight these claims and not just have to wait to trial to do it. So, you have employers who don't have to make the decision of settling out right away or going all-in in terms of trials. There is some hope for employers in 2025.

Besser

I agree, Eric. If an employer is well prepared with arbitration agreements and now with these PAGA amendments, they can at least defend against these types of cases and put themselves on an equal footing going forward.

Gitig

Especially with the reasonable steps. There are things that you can do on an annual basis to protect yourself if a PAGA claim is filed against you, which is a good thing for employers.

Besser

All right, well stay tuned for more content to come. Thank you all for joining us.

Gitig

Thank you.

OUTRO

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