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EMPLOYERS BEWARE! WAGE & HOUR VIOLATIONS CAN LEAD TO STEEP PENALTIES

In 2019, California collected over $88 million in PAGA penalties from employers.[1] The Private Attorneys General Act ("PAGA") authorizes employees to file lawsuits to recover civil penalties—which are otherwise only recoverable by the State—on behalf of themselves, other employees, and the State of California for Labor Code violations. PAGA penalties can quickly accumulate given the many possible Labor Code violations and the fact that penalties accrue for each violation (per pay period), which means that employers who do not realize they are doing something wrong face more liability as time goes on. This article shows how PAGA penalties for common wage and hour violations are calculated and compares them to class action damages so that the reader can assess potential exposure for wage and hour violations.

Wage and Hour Class Actions vs. PAGA Lawsuits

PAGA lawsuits have similarities and differences to wage and hour class action lawsuits, and plaintiffs may assert both:

Wage and Hour Class Actions	PAGA Lawsuits
One employee can bring a class action on behalf of other employees.	One employee can bring a PAGA claim on behalf of other aggrieved employees.
Requires class action certification to ensure the class representative adequately represents the proposed class. This is a big procedural hurdle for plaintiffs to overcome.	Class action certification is not required, but plaintiffs must exhaust their administrative remedies by first notifying the State of the violations to give the State the opportunity to address the violations itself
Requires that the plaintiff suffered a typical and common violation similar to the other members.	The plaintiff can sue on behalf of other employees who suffered different violations than those suffered by the plaintiff so long as the plaintiff suffered at least one violation.
Damages are owed to employees for the violations they suffered.	Civil penalties are assessed for violations of the Labor Code; 75% of the penalties go to the State, and 25% are paid to the aggrieved employees.
Statute of limitations for most wage and hour violations is four years.	Statute of limitations is one year.

LWDA Letters and PAGA Claims

Prior to commencing a PAGA action, the employee must provide written notice to the Labor and Workforce Development Agency ("LWDA") notifying the LWDA of the alleged violations in writing, a copy of which is also sent to the employer. The number of these PAGA notices the LWDA received each year has significantly increased, from 4,000 in 2014 to what is expected to exceed over 7,000 filings in 2022.[2] For more information about what to do if you receive an LWDA letter and how to "cure" (i.e., fix) certain violations, please refer to the article, ***"So You Were Copied on an LWDA Letter – What Do You Do?"***

How Are PAGA Penalties Calculated?

PAGA penalties are calculated using a two-step process:

	Example Scenario:
Steps	Non-Compliant Wage Statements (e.g., non-itemized deductions) for 50 employees for one year (26 pay periods)[3]
1) Determine the number of Labor Code violations within the statutory period.	50 employees x 26 pay periods = 1,300 violations

2) Determine the appropriate penalty (see below).	PAGA penalty for non-compliant wage statements is $100 for each employee per pay period for the initial violation and $200 for each employee per pay period for any subsequent violations. 1,300 x $100 = $130,000

Determining the Civil Penalty

The Labor Code may or may not provide a specific civil penalty for the violation.

If the Labor Code already provides for a civil penalty for the underlying violation, the employee can sue to recover that penalty on behalf of similarly aggrieved employees and the State. This includes when an employer:

- unlawfully withholds wages or fails to make timely payments ($100 for the initial violation and $200 for subsequent violations),
- violates Wage Orders regulating hours and days of work ($50 for the initial violation and $100 for subsequent violations);
- fails to pay minimum wages ($100 for the initial violation and $250 for subsequent violations).

When the Labor Code does not already provide a civil penalty, the PAGA "default" penalty is $100 for each employee per pay period for the initial violation and $200 for each employee per pay period for each subsequent violation. Claims that fall under the default PAGA penalty include:

- missed meal and rest break premiums;
- expense reimbursements;
- unpaid overtime;
- inaccurate wage statements; and
- waiting time penalties.

Subsequent Violations

When PAGA was first enacted, plaintiffs argued that if an employee missed a meal break at least one time per pay period, for example, over the course of 26 pay periods, there is one "initial violation" and 25 "subsequent violations." However, it is generally accepted now that for "subsequent violations," employers must have notice of a violation for the heightened penalty to apply. Therefore, until an employer has such notice, in our example, each pay period with a non-compliant wage statement would be an "initial violation." What constitutes sufficient notice triggering the heightened penalties is not clearly defined. Some courts have held that notice generally must come from a court or some enforcement authority (e.g., the Labor Commissioner). But it is unclear whether there needs to be a finding of a violation (after a trial or administrative hearing) or whether simply being notified of an allegation of wrongdoing is sufficient. If you receive correspondence from a court or other enforcement authority indicating potential Labor Code violations, please consult with legal counsel to discuss its implications and next steps.

Multiple Violations in a Pay Period

It also remains unsettled as to whether PAGA penalties for multiple violations in a pay period can be added together, also known as "stacking." For example, 50 employees who receive non-compliant wage statements (e.g., non-itemized deductions) and were not paid five hours of overtime per pay period (30 minutes of overtime per workday) over the course of a year (26 pay periods) may be able to claim penalties on the basis of potentially *two separate violations per pay period*: one violation for each non-itemized wage statement and one for unpaid overtime per pay period. In this case, the penalty calculation could be:

- 1 violation (non-compliant wage statement) x $100 penalty x 26 affected pay periods x 50 aggrieved employees = **$130,000**
- 1 violation (unpaid overtime) x $100 penalty x 26 affected pay periods x 50 aggrieved employees = **$130,000**

Total: $130,000 + $130,000 = $260,000

As evidenced by this example, PAGA penalties can quickly accumulate.

Individual Damages in Addition to PAGA Penalties

Employers should also be aware that in addition to PAGA penalties (which the plaintiff is ostensibly asserting on behalf of the State), plaintiffs may seek individual damages to compensate for any unpaid monies owed to the employee. Plaintiffs can assert those individual claims on behalf of themselves, or they can also assert them as a class action on behalf of similarly situated employees.

If the plaintiff filed a class action in addition to a PAGA action, the potential exposure to the employer would increase. Moreover, for such claims:

- the statute of limitations is generally four years;
- damages are measured by the number of violations that occurred rather than by the pay period.

Taking the same example (50 employees who did not receive compliant wage statements and were not paid 30 minutes of overtime per workday who were each paid $25 per hour) and assuming these violations occurred over the course of four years, the class action liability could be **$1,102,500**:

Unpaid overtime

- 4 years x 52 weeks per year x 5 workdays per week = 1,040 days
- 1,040 days x 30 minutes of overtime per day = 520 hours of overtime owed per employee
- 520 hours of overtime x 50 employees = 26,000 hours of overtime owed
- Assuming each of those 50 employees was paid $25.00 per hour, overtime is paid at 1.5x the regular rate (i.e., $37.50). The class damages for unpaid overtime would be 26,000 x $37.50 = $975,000.

Non-compliant wage statements

- 26 pay periods per employee[4]= $50 for the initial violation and $100 for 25 subsequent violations[5] = $2,550 per employee
- $2,550 x 50 employees = $127,500

Combining the class damages with the "stacked" PAGA claims of $260,000, the potential liability exposure is now $**1,362,500**.

PAGA penalties coupled with class action damages can create significant financial liability for an employer.

Key Takeaway for Employers

Due to the prevalence of PAGA lawsuits and the aggressive nature of PAGA penalties, the best way for employers to avoid liability is to ensure compliance with the Labor Code.

Given the complexities of the Labor Code and the Industrial Welfare Commission Wage Orders, you should contact your employment legal counsel for guidance on how they apply to your business.

Our employment law group are trusted advisors who are ready to assist you with:

- Defending against PAGA claims, class action lawsuits, or other legal action
- Managing challenging employee situations such as leaves of absence, a remote workforce, or complaints of harassment
- Updating your Employee Handbook
- Other legal issues related to hiring, compensating, managing, and separating employees

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[1]**https://esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG7350_BCP3230.pdf**; **https://www.populardemocracy.org/sites/default/files/sPAGA%20Report_WEB.pdf**

[2]**https://advocacy.calchamber.com/policy/issues/private-attorneys-general-act/**

[3]The statute of limitations for PAGA penalties goes back one year from the date of the notice to the LWDA, but PAGA penalties continue to accrue, so they could exceed a one-year period. We used one year for purposes of this example. This also assumes that there were exactly 50 employees during each pay period during the one-year period.

[4] The statute of limitations for non-compliant wage statements is one year.

[5]For purposes of damages under Labor Code section 226, "initial violation" and "subsequent violation" are defined differently such that there is only one "initial violation" per employee.

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