

# THE Private Attorney General Act (PAGA)

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# What is PAGA

- From a plaintiff's attorney view point it is a Godsend.

- From an employer's viewpoint it a disaster.



# What is PAGA

- The employee acts as a private attorney general and sues on behalf of the State of California.
- PAGA permits any current or former employee to sue a California company on behalf of *all “aggrieved employees”* for massive civil penalties for *virtually all violations of the Labor Code*—no matter how trivial the violation and regardless of any actual injury—so long as the plaintiff has suffered a single violation while employed.

# What is PAGA



- The employee gets to keep 25% of all the penalties collected and 75% goes to the State of California.
- Very importantly, the attorney for the employee *gets to collect his/her attorney fees!*

# PAGA Cases Keep Growing and Growing



- The annual number of PAGA cases remained under 700 during the first four years of PAGA's existence.
- During the next four years it jumped to more than 5,000.
- The year 2019 by itself saw a huge jump in the number of cases to **more than 6,000**.

# Many Employment Laws Can Be the Basis for PAGA

- It has been estimated that more than 100 employment laws, as well as health and safety laws and regulations - think about the potential regulations covering construction - can be the basis of a PAGA lawsuit for penalties.
- Many of these laws are well known by employers, such as wage and hour laws.
- But, for example, most employers do not realize that a violation of a wage and hour law can also be a violation of the law requiring complete and accurate wage statements.

# THE BASIS FOR A PAGA LAWSUIT



- A number of these laws can be obscure. For example - All employees must be provided with *suitable seats* when the nature of the work reasonably permits a seat. Even when the work requires standing, ***an adequate number of seats must be near and available*** so employees can use those seats at times when it doesn't interfere with their job duties

# THE BASIS FOR A PAGA LAWSUIT

- PAGA applies to both private and public construction projects.
- While prevailing wage laws cover the payment of wages in public projects, PAGA is still applicable for all the other possible claims by employees.
- For example, claims of meal and rest time violations, and claims of violations of Cal OSHA regulations (including COVID regulations)



# CAL SUPREME COURT MAKES IT EASIER FOR EMPLOYEES TO SUE RE REQUIRED MEAL PERIODS



- California law requires employers to provide nonexempt employees with an unpaid, 30-minute meal break without work on all shifts of greater than five hours, and the break must begin in the first five hours of work. If a proper break is not provided, the employee must be paid a premium equal to one hour of pay.
- The Supreme Court Holding: If there are no time records or if time records show missed, short, or delayed meal periods with no indication of proper compensation [in the form of a one-hour premium], then a rebuttable presumption arises against the employer. So, *the employer* must prove the employee took a 30-minute meal break without any work.

# THE BASIS FOR A PAGA LAWSUIT

- Here are some examples of an OSHA claim:

- Failure to furnish and use safety devices and safeguards, and adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful (Labor Code § 6401);

- Requiring or permitting an employee to go or be in any *place of employment which is not safe and healthful* (Labor Code § 6402)



# OSHA Rules Continued

Failure to take individual measures and screening such as temperature checks and pre-shift screening after possible workplace exposure;

Failure to have a written illness prevention program or provide training; and

Failure to establish infection prevention measures such as encouraging sick employees to stay home, implementing social distancing protocols, or establishing procedures to routinely disinfect and clean commonly used surfaces when needed



# EXAMPLE - COVID REPORTING REQUIREMENTS

The new notice requires employers to take the following actions indicated on the next slides within one business day of being aware any potential exposure as outlined outlined in the prior slide



# COVID REPORTING REQUIREMENTS

- (A) Provide written notice of possible exposure to all employees who were at the same site as the qualifying individual within the infectious period as defined by the California Department of Public Health - which is at minimum, the 48 hours before the individual developed symptoms.
- On site means the specific “worksite” the COVID exposed employee entered, such as the specific buildings or off-site work area (i.e., a construction site). It does not extend to areas which the individual did not enter.

# COVID REPORTING REQUIREMENTS

- (B) Provide written notice to all individuals and entities who may represent employees, including unions and sometimes attorneys.
- (C) Provide written notice to the employers of any exposed subcontracted employees.
- (D) Employers are also required to notify the local public health department within 48 hours of becoming aware of a COVID-19 workplace “outbreak”. Currently an outbreak is defined by the California Department of Public Health as three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households. The notice to the local public health department should include the number of COVID-19 cases at the worksite, as well as names, occupations and worksites of qualifying individuals.

# Some Rules About the Lawsuit

- Before filing a PAGA action, the aggrieved employee must exhaust specific administrative requirements by filing a written notice to the State, and serving it on the employer, “of the specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation”
- If the State agency does not take on the matter within 65 days, which it almost never does, then the employee can file the lawsuit.

# Some Rules About the Lawsuit

- The statute of limitations is one year back from the filing of the written notice and there must be at least one violation that occurred during that time period.
- It is not necessary to be certified as a class. All aggrieved employees during the statute of limitations period are automatically included.
- PAGA cannot be arbitrated
- It seems that there is no right to a jury trial - BP 1700 case



# What are the Penalties and How Do They Add Up

- Where no specific civil penalty is directly attached to a Labor Code violation, the PAGA penalty is **\$100 for each aggrieved employee per pay period** for an initial violation, and **\$200** for each aggrieved employee per pay period for every further violation.
- If there are violations of multiple laws, the employee may be able to recover the penalties on behalf of all employees for **EACH** of the violations.

# Here is How They Add Up

- Where there are also statutory penalties under a statute plaintiff's attorney will argue the employee gets those and the PAGA penalties - defense attorney will argue she gets only one.
- Suppose, for example, that an employer of 150 employees is sued for a repeated violation of *one Labor Code section*, and the violation affected each employee over the course of one year—during each of 26 biweekly pay periods. In this example the employer could be subject to penalties in the amount of more than \$700,000.
- Suppose it was a small employer with only 10 employees. The violation of one law for the course of a year would cost \$51,000.

# Here is How They Add Up



- Because Plaintiffs argue that penalties are cumulative for each distinct Labor Code violation, that figure could be doubled or tripled if there were multiple, recurrent Labor Code violations *or* if one act of misconduct violated multiple Labor Code provisions.
- Attorney's fees, which could run more than \$100,000, to the prevailing plaintiff would augment that total.

# Here is How They Add Up

- These penalties can be devastating to small and medium size businesses and even difficult for large businesses.
- The judge does have some flexibility in awarding less than the maximum amount.



# How to Survive This Onslaught

- BEFORE YOU GET SUED CONTACT AN EMPLOYMENT ATTORNEY
- The attorney should do an audit of, and recommend needed changes to:
  - Method of tracking time for payroll - critical based on recent Supreme Court case
  - Wage statements
  - Records for payroll
  - Health and Safety Policies
  - Other important policies
  - The employee handbook

# How to Survive This Onslaught

- If you receive the PAGA notice and then the lawsuit:
- Immediately contact an employment lawyer who knows how to defend these cases
- Try to get a quick settlement - but the attorney must know the important rules for these settlements
  - The court must approve the settlement
  - Settlement of an individual claim DOES NOT settle the PAGA claim

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