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“Prettymuch All Goes to the Attorneys (PAGA)” No More? Tentative Deal Reached to Reform California’s Broken Private Attorneys General Act

California Employment Law Update on **June 19, 2024**

Inspired by a push to repeal the Private Attorneys General Act (PAGA) by ballot measure (which we previously covered here and here), and at the urging of Governor Gavin Newsom, stakeholders have reached an agreement in principle to reform PAGA and avoid a high-stakes showdown come November. If the Legislature passes the compromise into law by June 27, the measure will be pulled from the ballot.

It is unclear at this time whether the agreement has been reduced to draft legislation, and as of this writing, bill text is not yet available. However, the Governor’s office released a summary of the compromise, which includes the following key features:

- **Penalty Structure:** The deal purports to reform PAGA’s penalty structure by employing both carrots and sticks to encourage Labor Code compliance. The carrot is an unspecified “cap” on penalties for employers “who quickly take steps to fix policies and practices, and make workers whole” after receiving a PAGA notice and on employers “that act responsibly to take steps proactively to comply” with the Labor Code. The stick takes the form of “new, higher penalties” for employers who violate the Labor Code “maliciously, fraudulently or oppressively.” The compromise also increases the amount of the penalty paid to aggrieved employees from 25% to 35%.

  While these reforms have generated the most headlines, open questions remain. The “cap” on penalties could have the potential to act as a kind of cure provision on steroids, providing an early exit ramp for unintentional technical violations. But if courts retain the same discretion to award less than the maximum penalty, the net effect of these provisions might not be meaningful for well-meaning employers, who in theory are already protected from “unjust, arbitrary and oppressive, or confiscatory” penalties.

- **Standing:** The compromise reportedly requires PAGA plaintiffs to "personally experience" the violations they allege. Current law, established in *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745 (2018), allows PAGA plaintiffs to pursue penalties for Labor Code violations that never affected them, so long as the plaintiff experienced *some other* Labor Code violation. This compromise apparently would abrogate that much maligned rule, placing PAGA plaintiffs on similar footing as class action plaintiffs. This could mark a sea change in PAGA litigation by possibly making partial summary judgment available to employers and limiting the effectiveness of "kitchen sink" complaints.

- **Manageability:** The compromise reportedly "[c]odifies that a court may limit both the scope of claims presented at trial to ensure cases can be managed effectively." It is unclear what this means (e.g., the word "both" is either extraneous or something is missing from this description). As we reported here, current law, as articulated in *Estrada v. Royalty Carpet Mills, Inc.*, 15 Cal. 5th 582 (2024), allows courts to limit a PAGA claim at trial but not before. It is unclear at this time whether the agreement is simply to codify *Estrada*, or to make further manageability-type reforms (e.g., allowing courts to make case management orders based on manageability concerns before trial).

- **Cure Provisions:** The compromise would expand the list of Labor Code violations that can be cured before a PAGA action commences, potentially increasing opportunities for employers to avoid lawsuits by making employees whole after receiving notice of alleged violations.

- **Injunctive Relief:** The compromise gives courts the ability to order injunctive relief—something AB 2288, which passed the Assembly in May 2024, would have done anyway.

- **Agency Enforcement:** The compromise would allow the Department of Industrial Relations (DIR) to expedite hiring to fill vacancies at the agency. The Governor's summary may be overpromising in saying this will "ensure effective and timely enforcement of employee labor claims," but it may allow the agency to pursue more claims in-house.

In some respects, the compromise may disappoint—for example, fiddling with the penalty structure but failing to address whether PAGA penalties can be stacked is a clear missed opportunity. However, the tentative deal could profoundly affect PAGA litigation by reining in some of the law's excesses and bringing it more in line with class action litigation.

We will carefully monitor and report on developments in this space.

View original.

Related Professionals

- **Gregory W. Knopp**
  Partner
- **Jonathan P. Slowik**
  Senior Counsel
- **Michelle L. Lappen**
  Associate