

# **PAGA Reform & Legal Best Practices**

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# Big PAGA News--Reform Is Here!



- Enacted through two bills:
  - Assembly Bill 2288 (Kalra)
  - Senate Bill 92 (Umberg)
- Signed by Governor on July 1
- Bills went into effect immediately but:
  - Some provisions go into effect in October
  - No retroactive effect





# **A PAGA Reform Victory: Impact and Insights for Your Business**



# Three Overarching Improvements

## 1) Penalty Modifications

- Including potential penalty reduction of **85 percent** or more if employers take “all reasonable steps” to comply with the law

## 2) Litigation Relief

- Standing
- Manageability
- Derivative Claims

## 3) Expanded and Robust Right to Cure Process





# Penalty Modifications

- **\$100** per employee per pay period is the default
- **\$50** per employee per pay period for violations from an **isolated, nonrecurring** event that did not extend beyond lesser of **30 consecutive days** or **four consecutive pay periods**
  - Intended to address things like 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



# Penalty Reductions # 1

- **Prior to Records Request or LWDA Letter**
  - Civil penalty is **not more than 15 percent** of penalties otherwise available if the employer (prior to records request or LWDA letter) took **all reasonable steps** to be in compliance all provisions identified in the notice
- **“All reasonable steps” include:**
  - Conducted periodic **payroll audits** and took action in response
  - Disseminated lawful written **policies**
  - **Trained** supervisors on legal compliance
  - Took **appropriate action** with regard to supervisors



# Penalty Reductions # 2

- **After LWDA Letter**
  - Civil penalty is **not more than 30 percent** of penalties otherwise available if the employer (within 60 days of LWDA letter) took **all reasonable steps** to **prospectively** be in compliance all provisions identified in the notice
- **“All reasonable steps” include taking an action to initiate:**
  - Conducting an **audit** of the alleged violations and taking action in response
  - Disseminating lawful written **policies** as to the alleged violations
  - **Training** supervisors on legal compliance
  - Taking **appropriate action** with regard to supervisors

**PENALTY**



# All Reasonable Steps

- Whether the employer's conduct was reasonable shall be evaluated by the 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 violations
- The existence of a violation, despite the steps taken, is insufficient to establish that an employer failed to take all reasonable steps
- Penalty reductions not available for heightened penalties (next slide)





# Heightened Penalties

**\$200** per employee per pay period if either of the following:

- 1) An agency or court issued a **finding or determination** to the employer that **its** policy or practice giving rise to the violation was unlawful (within 5 years preceding the alleged violation) **OR**
- 2) The employer's conduct was **malicious, fraudulent or oppressive**





# Litigation Relief







# 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.
- 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, in response to the 2018 case.

# Manageability Arguments Are Back!



- In response to another court decision.
- 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 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.



# Limitations on “Derivative” Penalties



- Prohibits 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 are neither willful or intentional
  - 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.



# ***Right to Cure Process***







# Cure Process (Small Employers)

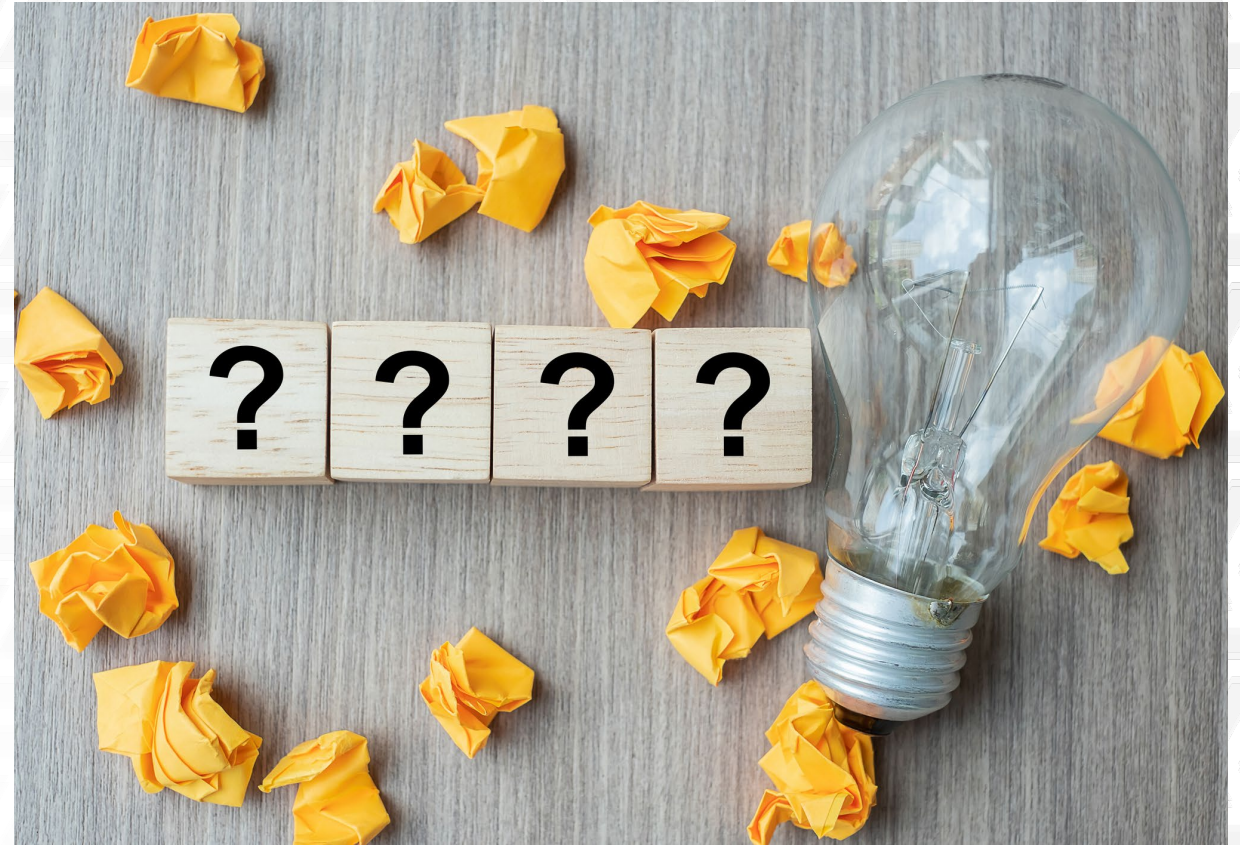
- Within 33 days of receipt of a notice from the LWDA, an employer with **fewer than 100 employees:**
  - May submit a confidential proposal to cure or more of the alleged violations
  - Process includes a multi-step review process with the LWDA
  - All communications as part of this process are intended to be privileged settlement communications that could not be introduced in court

# Cure Process (Large Employers)

- Employers with **100 or more employees:**
  - Can 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
  - Multi-step process for a civil court's review of a large employer's cure process



# ***What Did The Other Side Get?***





# The Other Side

- **Heightened Penalties (discussed previously)**
- **Exceptions To Penalty Reduction:** Allows a court to refuse to apply the penalty reductions if the facts and circumstances of a case warrant or to do otherwise would be unjust, arbitrary, oppressive or confiscatory
- **Non-Profit Legal Aid Organizations Can Bring Claims For Employees:**
  - 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
  - They will not have standing



# ***Audit Roadmap***



# Questions Before An Audit

- If you have active litigation, or a PAGA letter—consult with your attorney first.
- The Audit is something “discoverable” meaning a party adverse to you (Plaintiff) would get it in the litigation to show your Company is entitled to discounting.
- Consider **who** should do the audit—knowing you want it to show compliance.
- Consider **when** you should do the audit—show off piece rate compliance during harvest? Capture meal/rest period premiums paid?





# Audit Roadmap: Policies and Procedures

1. Review Handbook and Required Postings
2. Review Arbitration Agreement and Ensure Updated Language
3. Review Meal Period Waivers. How is Your Company using Waivers?  
Weekly/Seasonally/Daily?
4. Do Employees Know Who To Talk To About Wage and Hour Compliance?
5. Are employees using their cell phones/other business expenses? How is that captured?



# Audit Roadmap—Timekeeping

1. How is employee time recorded?
2. How are meals recorded?
3. How are you going to show compliance with recordkeeping requirements?
4. Do you have “perfect” timecards? *Let’s talk about the sample below...*

## Crew ABC

Start: 6am

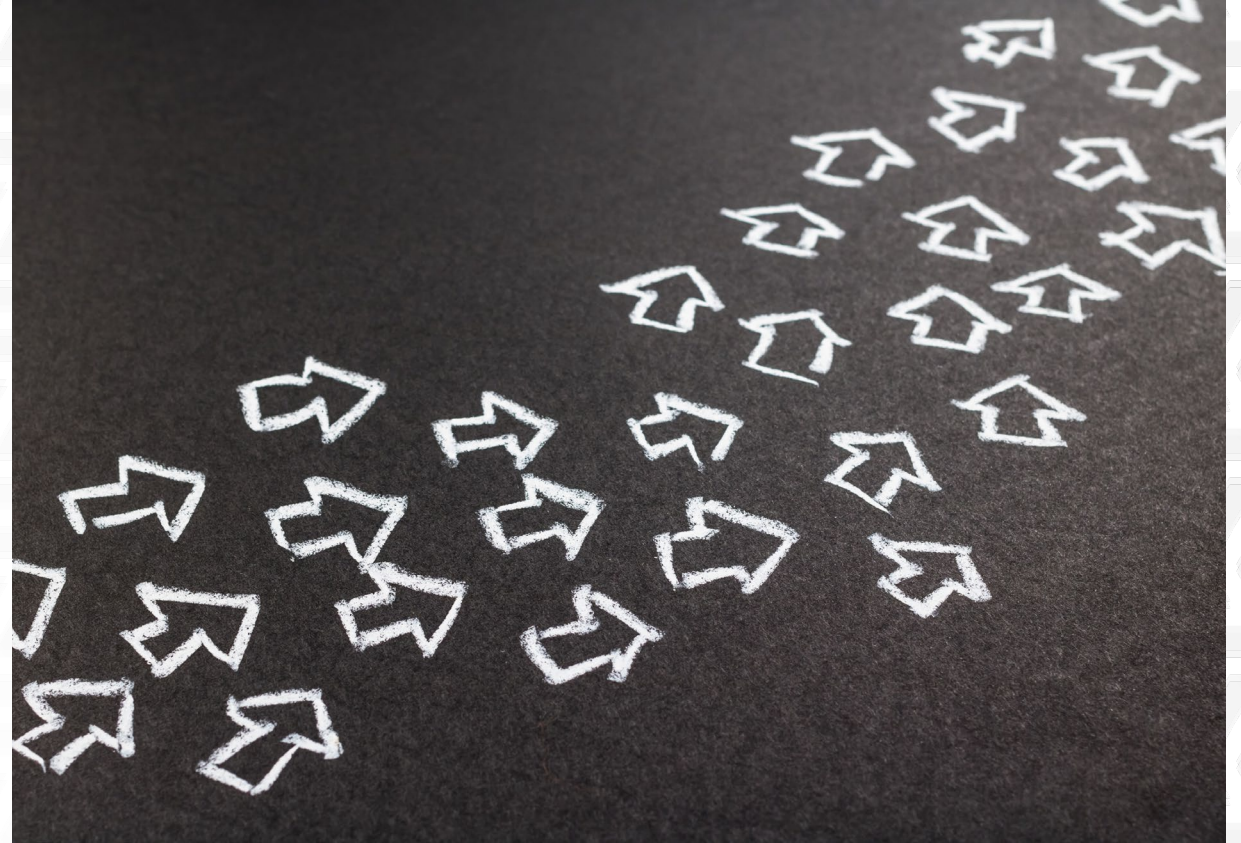
Lunch out: 10:30am

Lunch In: 11am

Out: 2:30pm



# ***Reasonable Steps***







# Reasonable Step Examples

1. Training for employees on policies and practices
2. Training for Supervisors on wage and hour policies and practices
3. HR on-site asking employees about their experience
4. Questionnaires
5. Refreshers and tailgate meetings
6. Depending on your operation—you may be doing these things already—identify them now

# QUESTIONS?





# THANKS

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