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Amendment not likely to be a cure for employers' problems with PAGA

by Emily Burkhardt Vicente

In recent years, California employers have faced an onslaught of lawsuits alleging technical violations of the California wage statement law. These cases, brought under California's Private Attorneys General Act, typically seek millions of dollars in penalties for a failure to include certain items on the employees' wage statements, even though that failure caused no harm or injury whatsoever to the employees bringing suit.

Business groups have long called for the California Legislature to take steps to curb this increase in "gotcha" litigation based on technical discrepancies in an employer's wage statements. Last month, California's government finally answered that call, at least in part. On Oct. 2, Gov. Jerry Brown signed Assembly Bill 1506 into law, amending PAGA to provide an employer with the right to cure certain technical violations of the California wage statement law before the employer can be sued. These amendments took effect immediately upon being signed into law.

PAGA allows an "aggrieved employee" to act as a private attorney general, bringing suit on behalf of him or herself and other current and former employees to collect civil penalties for California Labor Code violations. In most instances, an employer can be sued without an opportunity to cure the Labor Code violation at issue, even if the violation is purely technical. One commonly asserted PAGA claim that had no cure right until now was for violation of Labor Code Section 226, which requires that nine categories of information be displayed on every wage statement issued to California employees. Under the previously existing law, omission of any of the nine required items from a wage statement, even where the omission caused no actual injury to the employees, was considered a serious violation and not subject to PAGA's notice and cure provisions. Included in those nine categories is the requirement that every wage statement include the beginning and end date of the pay period and the name and address of the legal entity that is the employer of the person to whom the wage statement was issued.

Under the amendments, once an employee provides notice to the employer that the employer's wage statement does not include the beginning and end dates of the pay period or the name and address of the legal entity that is the employer, the employer may "cure" the alleged violation within 33 calendar days of the postmark date of the notice. This is good news for employers since many companies have paid significant multi-million dollar settlements in the last few years due to these types of technical wage statement violations.

Unfortunately, however, the statute's idea of how to cure a violation is likely to carry its own set of burdens for most employers, diluting the positive impact of this law. To "cure" one of these wage statement violations, the employer must provide a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice. If the employer properly cures the violation, the employee cannot pursue the claim. However, if the employer fails to properly cure the violation, the aggrieved employee may initiate a civil lawsuit to recover

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penalties. The cure provisions are curious since a PAGA claim carries only a one-year statute of limitations, but to cure the violation the employer must issue new compliant wage statements to all employees going back three years.

While this change in the law is a step in the right direction, the amendment is unlikely to curb the recent explosion in PAGA lawsuits alleging technical wage statement violations. For many employers, especially small employers, reissuing and redistributing new wage statements to all employees for a three-year period will simply be too burdensome to be feasible — putting the cure provisions out of reach for them.

The amendment also does not provide the ability to cure an omission of the other seven items required on a wage statement, such as a failure to list gross wages earned, or all applicable hourly rates. Employers can still face significant PAGA penalties for omitting these items from their wage statements, even when they result in no injury or harm to the employees bringing suit. Nor does the amendment eliminate the right to bring a class action for violation of Section 226, even where the only alleged violation is a failure to list the inclusive dates of the pay period or the name and address of the legal entity that is the employer. Those claims are still fair game unless an employer has a valid arbitration agreement with a class action waiver. It is also true that very few PAGA lawsuits are based solely on claims that the wage statements did not include the pay period or the employer's name or address. Most wage statement claims are tied to claims that employees were not paid for all time worked or did not receive premiums for missed meal or rest periods. In those cases, the alleged violation is that the wage statement did not accurately record all of the wages the employee should have received. The new law will have no impact on those claims either.

So, while Assembly Bill 1506 will have some positive benefits for California employers, it is unlikely to materially stem the tide of wage statement claims. If nothing else, however, it is a good reminder that the best defense against frivolous wage statement lawsuits remains the most obvious one - ensure the company's wage statements meet each of the requirements of Section 226(a). An ounce of prevention is worth a pound of cure, especially when that cure comes in the form of re-issuing three years' worth of wage statements.

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