



10-Step Plan To Limit Exposure For California PAGA Health And Safety Claims In The COVID-19 Era

Insights

9.30.20

California employers have been faced with an endless uptick of claims filed under the Private Attorneys General Act of 2004 – also known as PAGA – alleging violations of any of the hundreds of enumerated provisions of the state Labor Code. However, we have seen relatively few PAGA claims alleging violations of the Cal/OSHA health and safety law commencing in California Labor Code §§ 6300 *et seq.* That may all soon change. As the world – and California – continues to deal with the COVID-19 pandemic, we are likely on the verge of a new wave of PAGA litigation for alleged Cal/OSHA violations. This article provides a 10-step plan you can take to limit exposure for such claims.

Quick Background On PAGA Cal/OSHA Claims

PAGA permits an “aggrieved employee” to step into the state’s shoes and bring a representative action to recover civil penalties on behalf of themselves and other aggrieved employees. It permits workers to exponentially expand workplace disputes into large-scale and costly litigation. Some of the available Cal/OSHA PAGA claims against employers include violations for:

- Failure to provide a place of employment that is safe and healthful (Labor Code § 6400);
- 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);
- Failure to implement and maintain an effective written injury prevention program (Labor Code § 6401.7);
- Requiring or permitting an employee to go or be in any employment or place of employment which is not safe and healthful (Labor Code § 6402); and
- Failure or neglect to provide and use reasonably adequate safety devices and safeguards or adopt or use reasonably adequate methods and processes, or to do every other thing reasonably necessary to protect the life, safety and health of employees (Labor Code § 6403).

Additionally, certain Cal/OSHA provisions are expressly incorporated into state statutes, prohibiting discharge, threatened discharge, demotion, or suspension. They also prohibit any other discrimination or adverse action in the terms and conditions of employment for employee complaints about health or safety conditions or practices, instituting or participating in any such

proceeding, or exercising any rights under Cal/OSHA. And employees who refuse to perform work if it would result in a violation of Cal/OSHA safety standards or of a safety order and would create a real and apparent hazard to the employee or their fellow employees are also able to bring such PAGA claims.

Cal/OSHA PAGA Allegations In The COVID-19 Era

Many of the initial COVID-19 PAGA assertions we are starting to see are related to an employer's alleged failure to comply with the Cal/OSHA Labor Code provisions. Specifically, some of the allegations include the following:

- Failure to have a written Illness Prevention Program;
- Failure to provide washing facilities to maintain cleanliness;
- Failure to conduct a hazard assessment to determine if COVID-19 is a hazard in the workplace necessitating the use of the appropriate personal protective equipment;
- 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;
- Failure to provide illness prevention training; and
- Failure to take individual measures and screening such as temperature checks and pre-shift screening.

Procedural Requirements For PAGA Claims

Employers faced with a Cal/OSHA PAGA claim must determine if the proper procedural requirements were met by the alleged aggrieved employee. You should first quickly assess if there are any steps you should take to cure any of the alleged violations.

The category of the alleged violation determines the procedural requirements and your ability to cure violations. To bring a Cal/OSHA PAGA claim alleging workplace safety concerns, an employee must give notice to the Labor Workforce Development Agency (LWDA) and to the Division of Occupational Health and Safety (DOSH) of the specific provisions of Labor Code (commencing with Labor Code § 6300 *et seq.*) alleged to have been violated. This includes outlining the purported facts and theories to support the alleged violation.

DOSH is then required to inspect or investigate the alleged violation(s) not later than three working days after receipt of a complaint charging a serious violation, and not later than 14 calendar days after receipt of a complaint charging a nonserious violation days. If DOSH issues a citation or if the employer enters into an agreement with DOSH under certain circumstances, then the alleged aggrieved employee may not file a lawsuit. However, if DOSH does not issue a citation within the required six-month timeframe, or the alleged aggrieved employee disputes DOSH's decision not to issue a citation, the employee may pursue a Cal/OSHA PAGA lawsuit.

If DOSH fails to inspect or investigate within the three-day/14-day timeframe noted, then the employee may also pursue a Cal/OSHA PAGA lawsuit. There are some circumstances where you may cure the alleged Cal/OSHA violations (and meet all the cure requirements) within a 33-day window from receipt of the initial PAGA notice.

Given the various procedural paths that may be taken and the short 33-day timeframe to potentially cure, it is recommended that you immediately seek the advice of employment counsel knowledgeable with these claims upon receipt of a PAGA notice.

Potential Penalties

A successful alleged aggrieved employee generally may be able to recover (on behalf of themselves and other current or former employees against whom one or more of the alleged violations was committed) a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation, and \$200 for each aggrieved employee per pay period for each subsequent violation. These amounts can quickly accumulate into large sums, leading to massive exposure and possible liability. The employee is also entitled to an award of reasonable attorneys' fees and costs, compounding the potential danger.

10-Step Best Practices List To Limit Liability

In dealing with COVID-19 and potential workplace litigation, there is no one-size fits all answer. However, there are 10 steps you can take to help limit liability, particularly if faced with a COVID-19 PAGA claim:

1. Stay up-to-date and compliant with local, state and federal orders, guidance, and best practices;
2. Implement a written Illness Prevention Program with a COVID-19-specific addendum;
3. Conduct a site-specific hazard assessment;
4. Implement any appropriate safety and cleaning measures and provide employees with the appropriate personal protective equipment;
5. Implement applicable COVID-19-related policies including social distancing, face coverings, sanitation and disinfection measures, and other individual control measures such as pre-shift temperature checks, symptom screening, etc.;
6. Maintain clear and continuous communication with employees of COVID-19 health and safety measures;
7. Provide appropriate handwashing access and cleaning supplies;
8. Train employees on updated policies and procedures, including training on the Illness Prevention Program with COVID-19 specifics;
9. Maintain a clear reporting structure for health and safety concerns and reports of potential COVID-19 cases or potential exposure to COVID-19; and

10. Appropriately and timely communicate to employees and others at the workplace of any confirmed or suspected COVID-19 case.

Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in [our California offices](#), or any [member of our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center for Employers](#), maintained by our Taskforce.

For further information about COVID-19-related litigation being filed across the country, you can visit our [COVID-19 Employment Litigation Tracker](#). Our [COVID-19 Employment Litigation and Class & Collective Actions](#) section also has a listing of our litigation-related alerts and team members handling these types of cases.

This Legal Alert provides an overview of a specific state development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People



Hannah Sweiss
Partner
818.230.4255
[Email](#)

Service Focus

Litigation and Trials

Workplace Safety and Catastrophe Management

COVID-19 and the Workplace

California Class Actions and PAGA

Trending

COVID-19/Vaccine Resource Center

Related Offices

Irvine

Los Angeles

Sacramento

San Diego

San Francisco

Woodland Hills