LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY MARCH 21, 2024

MCLE

Common misconceptions about PAGA penalties

By JJ Johnston
Daily Journal Staff Writer

The past year has shone a spotlight on California's Private Attorney General Act (PAGA). Between the U.S. Supreme Court's decision in *Viking River Cruises* and the state Supreme Court's more recent ruling in *Adolph v Uber*, there has been no shortage of articles and analysis about the law. This coming fall, California voters could even throw the entire PAGA legislative scheme out the window.

Anyone and everyone practicing in the world of employment law should be very familiar with PAGA. They should understand the ins and outs of the law and be up-to-speed on PAGA procedures and penalties. But as someone who works as an employment law mediator, I can tell you firsthand that this is - surprisingly - not the case. The more I handle mediations involving PAGA claims, the more I encounter misconceptions about the penalties imposed under the law.

Unless or until PAGA goes away, the law remains on the books, and parties should know the penalties that can be assessed for Labor Code violations. Here are the most common PAGA penalty misconceptions that I have run across in my years as a mediator.

This art was created with the assistance of Shutterstock AI tools

Paystub violations

Frequently, the violation at issue involves information on employees' paystubs. Labor Code Section 226(a) requires employers to regularly give each employee "an accurate itemized statement in writing" that includes gross wages earned, total hours worked for nonexempt workers, deductions, net wages earned, dates covered in the pay period, identifying information for employee and employer, and applicable hourly rates. A record of deductions must be kept for at least three years.

An employer who fails to comply with these requirements may face two types of penalties. Labor Code Section 226(e) imposes a statutory penalty for "knowing and intentional failure by an employer to comply with subdivision (a)." The penalty, paid to employees harmed by the violation, is the greater of actual damages or $50 for the initial pay period when the violation occurred and $100 per employee for each violation in a subsequent pay period. The aggregate penalty is capped at $4,000, but costs and reasonable attorney's fees are also recoverable.

Labor Code Section 226.3 imposes a civil penalty of $250 for each initial violation and $1,000 for each subsequent violation when an employer fails to give an employee a wage deduction statement or to keep re-

cords as required by Section 226(a). The civil penalties are in addition to any other penalty provided by law, but it may be waived if the Labor Commissioner finds that it was due to a clerical error or inadvertent mistake.

Many plaintiff's counsel mistakenly believe that the civil penalty can be imposed whenever a paystub fails in any way to comply with the requirements of Section 226. This is incorrect. Unlike the statutory penalty outlined in Section 226(e), the PAGA civil penalty under Section 226.3 can only be imposed if the employer does not issue any paystub at all to an employee or fails to maintain records of deductions as required by the law.

The distinction between statutory and civil penalties for paystub violations is directly tied to the wording of Section 226.3. In *Gunther v. Alaska Airlines, Inc.* ((2021) 72 Cal. App.5th 334), the Court of Appeal for the Fourth District found that although the employer was subject to statutory penalties for failing to provide compliant paystubs, civil PAGA penalties were not applicable because "the plain language of the statute provides that heightened penalties apply only where the employer fails to provide wage statements or fails to keep required records, which is not the situation here." It should be noted, however, that if a paystub was provided but the information contained on the paystub does not meet the requirements of Section 226, the employee can still seek a lesser default PAGA penalty under Labor Code Section 2699(f)(2) of $100 for the initial violation and $200 for subsequent violations.

Untimely Payment of Wages

A second misconception arises around failure to pay wages owed. When employees have been underpaid for their hours worked, the amount still owing to them will ultimately end up being paid late. This has led some plaintiff's counsel to assert claims for penalties under Labor Code Section 204, which governs untimely payment of wages. They argue that even though the employee timely received a paycheck, he or she did not receive timely payment. This argument is erroneous.

Section 204 merely establishes a timeframe for payment of wages. For labor performed between the first and fifteenth of the month, payment is due between the sixteenth and 26th day; for labor performed in the second half of the month, payment is due between the first and tenth day of the following month.

In *See's Candy Shops, Inc. v. Superior Court* ((2012) 210 Cal. App.4th 889), the Court of Appeal for the Fourth District confirmed that Section 204 deals solely with the timely payment of wages, not amounts paid. "[T]he reference to 'All wages' in section 204, subdivision (a) pertains to the timing of wage payments and not to the manner in which an employer ascertains each employee's work time." The court cited a 1937 California Supreme Court case: "the sole purpose of [section 204] is to require an employer of labor who comes within its terms to maintain two regular pay dates each month, within the dates required in that section." (In re Moffett (1937) 19 Cal.App.2d 7, 14, 64 P.2d 1190.)

Although late payment penalties under Section 204 will not apply to underpaid wages, this situation should be distinguished from the waiting time penalty under Labor Code Section 203, which will apply whenever an employee has quit or has been discharged. In such cases, the employee must receive all compensation owing within the statutory time period, or the employer is subject to the penalty.

Initial vs. Subsequent PAGA Violations

PAGA penalties typically impose an initial violation penalty, as well as a higher penalty for subsequent violations. When preparing PAGA penalty calculations, plaintiff's counsel will often calculate the first pay period violation using the initial violation amount and will then apply the subsequent penalty amount for subsequent pay periods.

It is well settled, however, that PAGA violations for successive pay periods actually remain "initial" violations until such time as the employee presents evidence that the Labor Commission or a court has notified the employer that it was in violation of the Labor Code. This corresponds with a 1984 DLSE interpretation of former Labor Code Sections 210 and 225.5, in which the agency found that an "initial" violation was "[a]ny violation occurring on or after January 1, 1984, regardless of whether penalties were assessed," whereas a "subsequent" violation was "[a]ny violation which occurs after notice of a previous violation, regardless of whether penalties were assessed."

In *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1209), the Court of Appeal for the First District affirmed the DLSE's rationale: "Until the employer has been notified that it is violating a Labor Code provision (whether or not the commissioner or court chooses to impose penalties), the employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation' subject to penalties. However, after the employer has learned its conduct violates the Labor Code, the employer is on notice that any future violations will be punished just the same as violations that are willful or intentional – i.e., they will be punished at twice the rate of penalties that could have been imposed or that were imposed for the initial violation." (*See* also *Gunther v. Alaska Airlines, Inc.* ((2021) 72 Cal. App.5th 334, 356); *Bernstein v. Virgin Am., Inc.* ((9th Cir. 2021) 3 F.4th 1127, 1144).)

Premium Pay

Confusion also frequently arises in connection with payment of premiums as a potential way of avoiding PAGA penalties. Although the issue remains unsettled, case law suggests that paying premium pay may not absolve an employer from also paying PAGA penalties.

In its decision in *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal. 4th 1244, 1256, the California Supreme Court made clear that such premium payments did not wipe the slate clean. An employer might still face exposure for PAGA penalties for failing to provide an employee with a meal or rest break even though it had given the employee premium pay for the violation.

The court stated as follows: "The 'additional hour of pay' provided for in subdivision (b) is the legal remedy for a violation of subdivision (a), but whether or not it has been paid is irrelevant to whether section 226.7 was violated. In other words, section 226.7 does not give employers a lawful choice between providing either meal and rest breaks or an additional hour of pay. An employer's failure to provide an additional hour of pay does not form part of a section 226.7 violation, and an employer's provision of an additional hour of pay does not excuse a section 226.7 violation."

Conclusion

Unless or until PAGA goes away, the law remains fully on the books. Parties on both sides of PAGA actions should fully educate themselves about the penalties that can be assessed for various Labor Code violations.

As they assert or defend against PAGA actions, parties and their counsel should understand the difference between statutory and civil penalties for paystub violations, the difference between initial and subsequent Labor Code violations, the remedies available for underpayment of wages, and the limits of any self-help measures they may take. Such understanding will spare parties time, money and frustration while smoothing and shortening the negotiation process.

JJ Johnston *is the founder of Johnston Mediation. He has been mediating employment and class action matters for more than two decades and has more than three decades' experience as an employment attorney representing both plaintiffs and defendants in a wide range of cases, including wage and hour class actions, PAGA claims, wrongful terminations, discrimination and retaliation cases, sexual harassment cases, prevailing wage claims, fair pay act claims, and defamation claims.*

Reprinted with permission from the *Daily Journal*. ©2024 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.