

PAGA & Wage Hour Audit Basics for California Health Care Employers

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Chris DeMeo

Chris, welcome to Health Care Beat, a health law podcast brought to you by Seyfarth Shaw's cross-disciplinary health care group.

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Each Health Care Beat episode focuses on key industry trends and legal developments, while identifying practical takeaways for those dealing with these issues every day.

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I'm Chris DeMeo, a Seyfarth attorney in Houston.

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And I'm Amanda Genovese, a Seyfarth attorney in New York. Let's get started.

Chris DeMeo

On this episode of Health Care Beat. We'll cover the Private Attorneys General Act, and the importance of wage and hour audits for California health care employers. We're joined today by Elizabeth MacGregor and Galen Sallomi, all the way from San Francisco, California, two of our colleagues that are in the firm's California wage in our group, Elizabeth and Galen, welcome to Health Care Beat. Thank you.

Galen Sallomi

Thank you. It's a pleasure to be here.

Amanda Genovese

So Elizabeth and Galen, I know that we do a ton of work for a large, robust client list of health care companies in the ecosystem, and your team does a tremendous job doing both PAGA counseling and defense work. Can you give us a brief overview of PAGA as it relates to both health care clients and generally?

Elizabeth MacGregor

Yes, just a brief overview of PAGA. It's a California statute called the private attorneys general Act, and the private attorneys general act deputizes individual employees to act as the state's representative to recover civil penalties that were originally only recoverable by the California state labor commissioner. So it's really expanded the scope of potential liability that employers face, since it allows for employees

to recover penalties Even where there wasn't originally a private right of action. And one issue is that it does allow for a sort of duplicative recovery. For example, an employee may have had a private right of action under one statute, and then the way the labor code would also provide, in some cases, for a separate civil penalty. So now under PAGA, the employee can recover both the statutory and the civil penalty. So it is a statute that does open employers up to some pretty significant exposure in California. So if you have employees in California or operating in California, PAGA should be something that should be top of mind. Yes, absolutely. Elizabeth, could you walk our listeners through the key changes introduced by the recent PAGA reforms and their specific impact on employers in the health care industry. Yes, the reforms were effective as to PAGA claims in which the employee gave notice to the Labor and Workforce Development Agency on or after June 19, 2024 so the amendments don't apply to cases that were active before that, but for cases from that date forward, these changes apply, and there were a number of changes that affect employers. Under the revised statute, an employee must have personally suffered every violation that he or she attempts to bring on behalf of other aggrieved employees within the relevant statute of limitations. So that's helpful in containing claims that previously were quite broad and could be brought as to violations that the employee hadn't personally experienced, so long as the employee could show one violation. The revised statute also provides that the Superior Court can limit evidence that's presented at trial or otherwise limit the scope of the claim so that it can be effectively tried. That amendment codifies the California Supreme Court decision in Estrada and allows employers to make some arguments based on manageability. There are also a number of changes to the penalty structure under PAGA. In the new PAGA statute, penalties are \$100 per pay period per employee, whereas before the statute provided for \$100 and then \$200 for subsequent violations, there is a higher \$200 penalty in the current statute, which is for employers who have received an agency or court determination within the past five years that the policy or practice giving rise to their violation was unlawful, or if the court determines that the employer's conduct was malicious, fraudulent or oppressive, the new PAGA statute also eliminates derivative penalties that were previously recoverable under Labor Code. Section 203 for failure to pay all wages timely at termination, section 204 which is timely payment of wages during employment, and section two to six for inaccurate wage statements. So now employees can't recover penalties for those statutes if they've already recovered on the underlying statute, except where they can show that the conduct was willful or intentional for Section 203 and 204 or knowing it intentional for a wage statement violation. There are other reductions in penalties that employers can take advantage of, and the one that's most relevant for our purposes here is that the revised statute provides for a reduction in penalties for employees employers who take all reasonable steps to be in compliance with the provisions that are at issue with identified in the L. WDA letter. So in those cases, if the employer has taken all reasonable steps to be in compliance with those provisions, then penalties are capped at no more than 15% of the total available penalties, and the employer takes all reasonable steps, if they're conducting regular payroll audits and taking actions in response to those audits, if they're disseminating lawful policies, training supervisors on the applicable Labor Code and wage order compliance or taking appropriate corrective action with regard to their supervisors and whether an employer's conduct is reasonable, is evaluated by the totality of the circumstances. It's also there's a cap on penalties for employees who take all reasonable steps to be in compliance after they receive the LW J notice. In those cases, the employer has to be in compliance within 60 days of receiving the notice, and in that case, penalties are capped at 30% of what would otherwise be available. There are a few other notable changes wanted to expand and cure provisions. So for many, many of the provisions that employees can sue under, there is a cure

provision for employers who are in compliance with the underlying statute, or who make the employee whole? That's sort of a complicated issue. It's not completely clear how it's going to shake out. The statute says that the employee is made whole when the employee has received an amount sufficient to recover any owed unpaid wages due on the underlying statute going three years back from the date of the notice, plus 7% interest and any liquidated damages required by the statute, as well as reasonable attorneys fees and costs. So that is a pretty significant amount of money that an employer would have to probably commit to to provide upfront to share these provisions under the statute, which is why it's important for employers to make sure they're complying with the provisions about taking all reasonable steps to be in compliance with the labor code in the first place by undertaking those audits and other steps that the statute lays out. And then a final revision that's worth noting is the President the addition of an Early Neutral Evaluation in PAGA cases. And the procedure differs depending on whether the employer has more or fewer than 100 employees. If the employer has more than 100 employees, then there's an Early Neutral Evaluation with the judge that the employer can take advantage of. The purpose of that evaluation is to evaluate whether any of the alleged violations occurred, whether the employer has cured any violations, the strengths and weaknesses of plaintiff's claims and the employer's defenses, and whether any part of the case can be settled. That provision could be helpful to getting an early resolution of the case without going through lengthy, protracted litigation that can become quite expensive. In the case of employers with fewer than 100 employees, they can submit a cure plan to the Iwda before the case is filed, and there's a potential to get the case resolved that way, even before litigation. Those are the main changes. There are other changes, so it's important to review the statute, but those are the main things that employers should know about. And one important takeaway, as I've mentioned, is that under the reformed PAGA statute, there is an avenue for employers to show that they're in compliance with the labor code or taking steps to be in compliance with the labor code and take advantage of reduced penalties.

Chris DeMeo

Galen, could you talk about how audits can help employers prepare for or respond to a PAGA claim, and in that context, what is it that employers, and particularly health care employers, usually do that can get them in trouble in this context?

Galen Sallomi

Absolutely so to start off with, an audit is just a shorthand for various ways that we can do a factual investigation to help employers avoid future litigation risk by identifying the myriad of potential Wage and Hour violations that exist under California law. So there's three main contexts when you might want to consider doing an audit, first, as part of the due diligence process before or during the acquisition of a smaller, mid sized company. Second, as part of a regular hygiene process. This is particularly useful for commonly targeted companies. You'll know if you fall in that category, or third, if an employer has received a PAGA letter, demand letter from plaintiff's counsel or even a lawsuit, and it's particularly useful if the employer is taking advantage of the new Early Neutral conference process that PAGA provides. In all of these circumstances, an audit can help you by allowing you to present data to rebut plaintiff's allegations about the violations, show that the alleged violations have been cured, or to just understand what's going on on the ground within your companies. So when you're conducting an audit, really, the first thing you're going to want to do is determine what the scope is. Are you going to look at a particular work site, a particular department, a particular group of employees? It's often helpful to do a

statistical sample, especially when you're collecting the relevant information. So you're not going to look at everyone's time cards, but you're going to want to look at a few. You're not going to want to look at everyone's pay. Pay stubs, but you're going to want to look at a few. It's pretty easy. We have a lot of data scientists who can analyze the information to figure out if there are any potential issues when you're looking at the pay stubs and the time cards. We're also going to want to look at the written policies or procedures, if there's any practices about time and pay practices, when are employees permitted to take their breaks? When are they required? Are their lunch periods scheduled? Or are they ad hoc? This is very important, although it might seem somewhat trivial, because these little practices can add up to huge liabilities. The third thing that we're going to want to do when we're conducting an audit is do a site visit. We're going to want to walk through the facility that's being audited so we can talk to the managers, so we can talk to the supervisors and figure out if there are any informal practices that might deviate from the formal, written policies. We're also going to want to look at various issues that can create liability down the road. So for example, new California opinion, the Cuerta versus CSI, electrical contractors incorporated case, recently held that when an employee is required to spend time on the employer's premises, awaiting and undergoing an employer mandated entry and or exit security procedure, and in that case, it included a visual inspection by a security guard of the employee's personal vehicle. That time waiting for the security process was compensable as hours worked, and the employer was liable for not paying the employees their hourly rate for the time they spent waiting for those security checks. Now the court did imply that the mere scanning of an employee badge to facilitate the opening of the security gate would not be compensable time. However, that has not yet been litigated, and courts also have not definitively addressed whether other types of security checkpoints might or might not be compensable time. So for example, if there were a COVID screening checkpoint at the entrance of the facility, that was an issue that was addressed and raised during the COVID pandemic. But this is the type of thing that we look for when we do a site visit for an audit.

Chris DeMeo

And how'd that shake out with the COVID screening when it was raised?

Galen Sallomi

My understanding is about it was not definitively addressed whether it was or was not a violation. We did encourage some employers to pay for that as compensable time. However, those have largely been eliminated, and so it hasn't come up as much as it was during the 2020, and 2022, time periods. So after collecting the information, the next step is to analyze the issues and figure out what we're going to do next. Now it's obviously important to communicate the information back to the employer. I will caution that it's important to understand that this information should remain privileged. It's we don't want employers to unintentionally create bad evidence in air quotes if there's a non privileged audit or report that could be used in later litigation. So the main goals of the audit right are to ensure that your policies address the situations that they are compliant with California's ever changing Wage and Hour obligations, that those policies are actually communicated to employees and that managers or non exempt employees receive regular and adequate training on those policies such that they're actually following up. It's also helpful to ensure that the employer has actually addressed the regular rate of pay compliance that's often required to be done at the payroll level, as opposed to the individual manager level. Now, one thing I'd like to discuss a couple of specific sample audits, right? So, for example, we mentioned earlier, California has very specific provisions about what types of information must be

included on the wage statement. There's a list. It's about a dozen things that must be included. However, it's really not clear. It's very easy for employers to fall into mistakes, especially health care companies. One of the very common problems that we've seen has been it's called the regular rate of pay, right? So the wage statement requires an employer to show all rates of pay that the employer receives if they're hourly employee, and it's very common for health care providers to give non discretionary bonuses that can affect the employee. Regular rate. So for example, if there's a shift differential or a non discretionary bonus, if the employee you know shows up and works five days out of the week, or if they're not late, something like that, those types of payments often do affect the employee's regular rate, not always, but they often do. And so it's important to make sure not only that the employer is calculating the regular rate of pay, which is used for the purposes of calculating the amount of overtime and premium pay that the employee is entitled to, but that those rates are clearly shown on the wage statements. And the reason we raise this, especially in the context of an audit, is it's very easy for a former employee, or even a current disgruntled employee, to take their wage statement to a plaintiff's counsel, who can pretty easily determine if there are any violations, and then, you know, they flip on their switch and file a lwda pocket letter. On the flip side, it's just as easy for us to do the same thing, except we're not going to file a pocket letter. We're going to help you, help you fix it.

Chris DeMeo

Do the courts or the place attorneys or whoever look behind that regular rate of pay? Is that subject to scrutiny or be as long as you include it in there your check the box?

Galen Sallomi

It certainly can be subject to scrutiny. And you know, if there is a full lawsuit, then you know, there's the opportunity for plaintiff's counsel to undergo full discovery in the court. Would or the arbitrator, if there's a arbitration agreement, would definitely look behind the wage statement. However, we highlight this because it's often the case after we have resolved these pocket cases, we try to figure out what prompted plaintiff's counsel to file the lawsuit in the first place, and most of the time, it's something as simple as not seeing the regular rate of pay on the wage statement that prompts the lawsuit. And so if we can, you know, address that at the onset, even if the company has been diligently trying to comply with California law, you know, these things are very difficult to comply with. And so you know, showing the you know you've dotted your I's and crossed your T's is often enough to avoid the problem in the first place.

Chris DeMeo

And so if you have a mistake in filling out the form, say the regular rate of pay blank isn't filled in, is your liability confined to that one issue, or does that open up every problem that could be explored in a PAGA Wage and Hour claim suit?

Galen Sallomi

That is an excellent question.

Chris DeMeo

Oh, thank you.

Galen Sallomi

I'll kick that back to Elizabeth, because that's one of the issues that was addressed with a new PAGA statute.

Elizabeth MacGregor

Yeah. So, originally, under the old PAGA statute, the way it was, is that if an employee or if an employee could show that he or she suffered any violation, then that employee could recover penalties for pretty much anything, even if they hadn't personally suffered that violation. So that is what allowed claims to be so broad and so difficult to defend, because he really didn't have a lot of ways to limit the scope of a PAGA claim if an employee chose to bring it on a very broad basis. Here with the new amendment, the employee is limited to claims that he or she personally experienced during the statutory period, which is extremely helpful, because then if you get the complaint and you can get admissions and litigation, the person never suffered some violations, then those those claims just won't be an issue anymore. So that is an extremely helpful amendment for for employers.

Chris DeMeo

Wait a second, are you saying that the California Legislature amended the statute to make it more business friendly?

Elizabeth MacGregor

Yes, yes.

Chris DeMeo

I don't believe that for a second. Have we checked this out, Amanda?

Galen Sallomi

It's the shocking fact sometimes they'll toss us a bone over in Sacramento.

Chris DeMeo

Was that helpful amendment to the statute? Are there? Are there two or three takeaways that our audience can point to with their horizon and the dawn of this new age and in PAGA enforcement?

Galen Sallomi

Yeah, absolutely. I'll throw in my two cents and then kick it back to Elizabeth. So to tie these regular audits back to the new PAGA provisions, conducting a regular audit of kind of the either the low hanging fruit of just looking at the wage statements or doing a more in depth faculty facility or department audit can be very helpful to give employers actual data that they can use in, for example, a PAGA Early Neutral Evaluation conference to rebut the plaintiff's allegations, or to offer a post resolution audit as a method of confirming that the promise changes have actually been implemented. If. Just, you know, there's a concern about that, which there often is.

Elizabeth MacGregor

Yeah, that's right. So I think the major takeaways are the importance of conducting regular audits in order to be able to take advantage of the reduced penalties the 15 or 30% and then, as Galen was saying, it's also helpful to the cure and Early Neutral evaluations, because those changes the procedure for the cure and the Early Neutral Evaluation take place on a very short timeline. So if the employer doesn't have the information, or really has to dig into it, it can be hard to meet that timeline. So if the employer wants to take advantage of those provisions, then the audits are helpful to being able to just pull up, do a quick search into whatever the issue is, and seeing if we have anything we can respond with. So in that respect, the audits are useful, both respectively, and even after the location is filed.

Chris DeMeo

That's great, very helpful.

Amanda Genovese

Well, that's all the time we have for today. Elizabeth and Galen, we'd like to thank you for joining us and sharing your insights with our listeners. Have a great one.

Elizabeth MacGregor

Thank you.

Galen Sallomi

Thank you.

Chris DeMeo

Thanks, guys.

Amanda Genovese

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