Insights: Alerts

New California Law Gives Employers an Opportunity to Avoid Certain Lawsuits Alleging Defective Wage Statements

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New legislation in California will help employers avoid costly litigation alleging violations of that state's employee wage-statement requirements. The new legislation, signed into law by California Governor Jerry Brown on October 2, 2015, gives California employers an opportunity to cure certain technical defects in the wage statements that they give to employees each payday and is expected to reduce the flood of wage-statement-related lawsuits under California's Private Attorney General Act ("PAGA") that employers have experienced in recent years. The new legislation, which amends PAGA, is effective immediately, having been deemed an "urgency statute."

The PAGA Amendments

Under PAGA, an aggrieved employee can bring a civil action on behalf of himself and other aggrieved employees to recover penalties for certain California Labor Code violations (including violations of the wage-statement requirements), penalties that would otherwise be assessed and collected by California's Labor and Workforce Development Agency ("LWDA"). Under PAGA, the employee(s) bringing the action are entitled to 25 percent of the penalties, and the remaining 75 percent is distributed to the LWDA. PAGA actions are extremely enticing to plaintiffs' attorneys because of the availability of attorneys' fees and because onerous class-certification requirements do not apply to PAGA actions. Violations of California's wage-statement requirements have provided a particularly fertile source for PAGA lawsuits.

Under Section 226 of the California Labor Code, employers must provide their employees with an itemized wage statement that includes nine items, including gross wages earned, total hours worked, all applicable hourly rates, all deductions, the inclusive dates of the pay period, and the name and address of the legal entity that is the employer. In 2013, Section 226 was amended to make it easier for employees to show injury from wage-statement violations. As a result, lawsuits asserting claims for inaccurate wage statements increased. Potential damages are costly. The statute of limitations for a wage-statement violation is one year, and the civil penalties are $100 for an initial violation and $200 for subsequent violations, each per aggrieved employee and per pay period (in addition to statutory damages recoverable by each employee). Not surprisingly, violations of Section 226 are frequently asserted in PAGA actions.

Prior to the October 2, 2015 amendments, an employer could cure a violation of certain Labor Code sections to avoid a PAGA claim. However, the wage-statement statute was not one of them. An employer who misidentified the parent company on a wage statement as the "employer" instead of a subsidiary, for example, was subject to a PAGA action and damages for violation of Section 226.

In what some are touting as a “job creator” measure, the new PAGA amendments give an employer the right to cure certain violations of Section 226 (but not all) to avoid a PAGA action. Specifically, under the amendments, employers can cure a violation of the requirement to provide employees with a wage statement that includes the inclusive dates of the pay period and the name and address of the legal entity that is the employer. The employer has 33 days from the day it receives notice of the violations to cure such violations and to give written notice of such cure by certified mail to the aggrieved employee and the LWDA. The amendments provide that covered violations of Section 226 are cured only “upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date” the employer receives notice of the violation. Employers can cure such violations of Section 226 only once in a 12-month period (if the violations alleged are the same as violations previously alleged and cured).

Practical Implications

The PAGA amendments are generally employer-favorable and were supported by the California Chamber of Commerce. Supporters believe the amendments will allow employers to devote financial resources to job creation instead of defending against litigation for technical violations of Section 226.

However, employers should be cognizant that the right to cure is available only during a 33-day period following notice of an alleged violation of Section 226. Employers should be prepared to move quickly to respond to a notice of such alleged violations. Many employers engage a third-party entity to provide wage statements to employees, and some of these entities may not appreciate the significance of violations of Section 226 and the need to correct violations quickly. Programming difficulties can further delay curing any violations. Additionally, violations of the relevant portions of Section 226 are not deemed “cured,” so as to avoid a PAGA claim, until all aggrieved employees have been provided with fully compliant wage statements for every pay period for the past three years. That requirement will certainly take time to implement and satisfy. Thus, every day of the 33-day cure period will count.

The amendments indicate that they will take effect immediately “in order to incentivize prompt resolution of disputes over itemized wage statements.”

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