

Skip PAGA's early evaluation conference, proceed to mediation

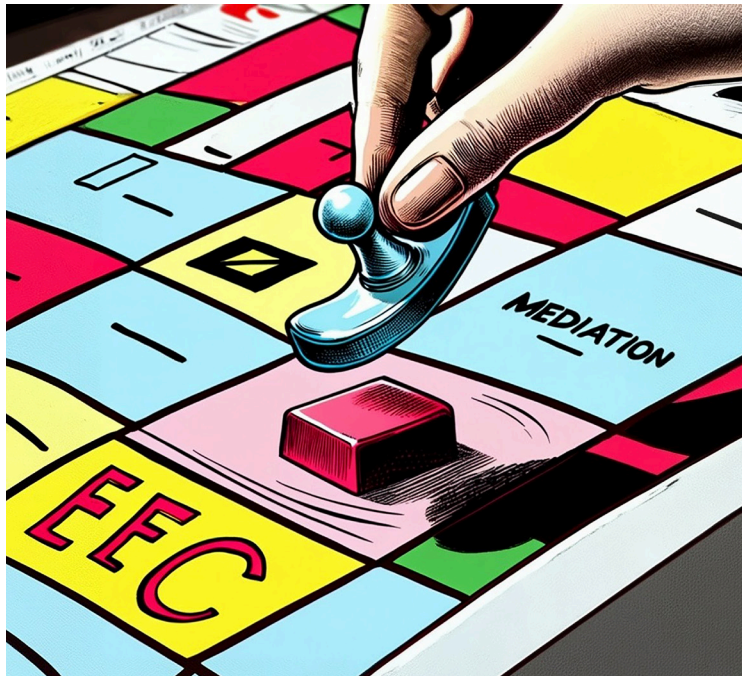
California's 2024 PAGA amendments expand employers' ability to cure Labor Code violations but create a complicated early evaluation conference process that may prove more costly than resolving claims through private mediation.

By Allison Eckstrom

In amending the Private Attorneys General Act (PAGA) in 2024 (AB 2288 and SB 92), the California Legislature significantly broadened the ability of employers to cure Labor Code violations during the statutory notice period to avoid litigation in court and/or reduce potential civil penalties. Employers can now cure claims for minimum wage, overtime, meal/rest breaks, necessary expense reimbursement, and all requirements for itemized wage statements.

The amendments also created an early resolution process, affording employers a path to avoid costly litigation after the expiration of the notice period and formal service of the PAGA lawsuit on the employer. The early evaluation conference (EEC) procedure affords employers with at least 100 employees (and smaller employers who wish to participate in the process) the right to formally stay court proceedings and appoint a neutral to evaluate, among other things, whether any of the alleged violations occurred and, if appropriate, the employer's plan to cure those violations. The EEC process, which is separate from the LWDA's administrative cure process, is ostensibly focused on early resolution of PAGA claims.

However, the recent PAGA amendments neglected to provide a clear roadmap for parties once the EEC procedure has been initiated by an employer. Anyone and everyone



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working with PAGA claims - judges, counsel, and parties - must navigate a complicated and confusing landscape, and, ultimately, the EEC process may prove to be more costly and time-consuming than simply agreeing to stay the litigation and participate in early mediation. For most PAGA lawsuits, compromise and settlement through private mediation will afford the simplest and smoothest path toward resolution.

EEC: An unnecessarily complicated and lengthy process

When an employer receives notice of an alleged Labor Code violation, it has the right to cure certain violations (or take reasonable steps to

comply with the law) in order to reduce any applicable penalties and/or potentially avoid litigation. But it must do so promptly within the notice period (and in certain instances within 33 days of the notice). If the employer cannot meet the deadlines, it likely will face a PAGA lawsuit while the penalties keep adding up.

But how many violations can realistically be cured (and/or remedial measures implemented) within the notice period? Most Labor Code violations will require far more time and effort to assess and address. Employers need to review the allegations, determine whether they hold water, and formulate a response. An audit could entail com-

plicated review of the employer's payroll and timekeeping systems and might require the employer to work with third parties (e.g., payroll providers or damages experts) to accurately assess the exposure and evaluate corrective measures. In many cases, the employer will be hard-pressed to meet the statutory deadlines to cure the violations and/or correct the practices during the notice period.

Then, once the lawsuit has been filed and served, the employer's next option is to invoke the EEC procedure and request a stay of the court proceedings. Unless there is a reason to deny a request, courts will issue orders staying the proceedings and setting a mandatory EEC no later than 70 days after the order. And thus starts a complicated process with potential roadblocks to resolution.

Within 21 days of the court's order, the employer must submit a confidential statement to the neutral and plaintiff, explaining the basis and evidence for disputing the alleged violations as well as a proposed plan for curing any of the alleged violations. To "cure" a violation, the employer must correct it, be in compliance with the underlying statute, and make each aggrieved employee whole. The plaintiff must respond to the employer's confidential statement by providing a detailed explanation of the basis for the allegations, the penalties sought for the alleged violations, the attorney's fees/costs incurred to date, any demand for

settlement of the entire case, and why the plaintiff will accept or not accept the employer's cure proposal.

The goal of the EEC is to determine whether the alleged violations occurred and, if so, if they were cured. The neutral examines the strengths and weaknesses of both parties' positions, whether any of the plaintiff's claims could be settled in whole or in part, and if information sharing between the parties might help resolve the dispute.

For straightforward claims that involve undisputed violations that can be easily quantified and corrected, the EEC process can serve as an effective means of resolving the dispute without costly litigation. However, if the parties dispute whether any violations actually occurred, whether the proposed plan sufficiently cures those violations, and/or whether the plaintiff's settlement demand is reasonable, the EEC process could prove to be a futile endeavor.

Curing violations could cost employers more than negotiating a settlement

If an employer elects to cure any violations alleged by the plaintiff, it must do so within the confines of the PAGA cure provisions set forth in Labor Code Section 2699. For employees who are owed wages, "cure" consists of payment of an amount "sufficient to recover any owed unpaid wages due...dating back three years from the date of the notice, plus 7 percent interest, any liquidated damages as required by statute, and reasonable lodestar attorney's fees and costs. ..."

Think about it: Back wages for three years plus 7% interest plus liquidated damages plus reasonable attorneys' fees and costs. If an employer could settle the claim early through mediation, it would

likely avoid interest and a good portion of liquidated damages that would attach to a judgment in court.

For wage statement violations, the cure process could really break the bank. Wage statement violations under Labor Code Section 226(a) (8) require written notice of the correct information to each aggrieved employee. But violations of Labor Code Section 226(a) (1) through (7) and (9) require that the employer provide, at no cost to the employee, "a fully compliant, itemized wage statement or, if such information is customarily provided in digital form, reasonable access to a digital or computer-generated record or records maintained in the ordinary course of business containing the same information required on a fully compliant, itemized wage statement, to each aggrieved employee for each pay period during which the violation occurred during the three years prior to the date of the notice."

For employers without a digital/computer option, curing the wage statement violations could be cost-prohibitive. Indeed, for employers who use national payroll providers (e.g., ADP or Paychex), the cost of re-issuing compliant wage statements, especially for weekly payrolls, could far exceed simply paying the civil penalties. As with back wages, early mediation of such claims could save a company's bottom line while providing relief to plaintiffs sooner than if they waited out the EEC process or litigation of claims that cannot be cured within the statute.

PAGA notices may include violations not curable under the statute

Labor Code violations rarely exist in isolation. Even when certain violations have been identified and cured, there may be collateral vi-

olations that are not capable of a cure within the PAGA statute. For example, it is common for PAGA notices to include allegations of unlawful off-the-clock practices that result in unpaid wages or rest break violations that cannot easily be assessed based on the employer's records.

As a result, only in very limited circumstances should we expect a cure plan to go through the EEC process and, once effectuated, completely dispose of the plaintiff's lawsuit. The more likely scenario involves outstanding claims that cannot be resolved without litigation, with the parties continuing to incur attorney's fees and costs, and interest accruing on potential liability.

Early mediation makes sense

Participating in the EEC process and curing violations in accordance with the PAGA statute could prove to be far more expensive than negotiating a discounted settlement and broad release through mediation.

As we have seen, curing PAGA violations can be a complicated and expensive process. Courts routinely grant defense requests to stay, leaving plaintiffs to wait unnecessarily long periods of time for their matters to be resolved. Employers then find themselves expending considerable amounts of time and money to rectify fairly minor violations.

In fact, the amended PAGA statute itself contemplates scenarios where mediation makes more sense than an EEC. Section 2699(f) (14) specifically provides that nothing "prevents the parties from agreeing to their own mediation process." And herein lies the solution.

Distilled to its essence, the EEC process is nothing more than a lengthy and convoluted mediation. Both sides present their positions to a neutral who is tasked with reviewing those submissions and

facilitating a settlement. Just as in a private mediation, the parties are ultimately in control of their fates. But unlike a private mediation, the EEC process makes participants jump through unnecessary hoops and comply with timetables.

How much simpler, then, to get everything resolved in a single day. When an employer is faced with a cure - correcting three years of wage statements - that is both costly and time-consuming, the parties can agree to compromise and settle the matter, often at a discounted amount. When an aggrieved employee is entitled to penalties even after a cure has been implemented, the parties can agree to compromise and settle the matter out of court.

Mediation enables plaintiffs to be made whole while freeing defendants from a nightmarish obstacle course of statutory compliance. Everybody can win when PAGA claims are resolved between parties through early mediation.

Allison Eckstrom is a neutral at Signature Resolution with more than two decades of experience in employment and wage and hour litigation. She can be reached at aekstrom@signatureresolution.com.

