


Ogletree Deakins | California Employment Law Update



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Legislative Developments



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PAGA Reform

- California legislature introduced two bills, AB 2288 and SB 92.
- Governor signed the law, and it is effective July 1, 2024



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PAGA Reform
What is PAGA?

- This allows plaintiffs—and their for-profit attorneys—to seek millions in civil penalties for violations of the Labor Code & Wage Orders.
- These “civil penalties”, which have a one-year statute of limitations, are assessed in addition to statutory damages.
- For example, a plaintiff might seek \$10 or \$20 in unpaid wages during a pay period, but also seek \$100 in PAGA penalties for the same violation.

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PAGA Reform
How is PAGA a problem?

- Easy to file / allege violations.
- No arbitration.
- No class certification procedure
- Suing employee can pursue penalties even if not directly harmed by a violation.

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PAGA Reform
Is the new law good?

Yes	No
It takes effect immediately and applies to PAGA claims filed on or after June 19, 2024.	It will do nothing to help employers facing thousands of lawsuits. If anything, it will make it harder and more expensive to settle those cases.
It eliminates PAGA's worst excesses.	PAGA's worst excesses were created by the courts.
PAGA claims will be tied to the plaintiff's own experiences.	Plaintiff's attorneys will just find new additional plaintiffs.
Employers have a greater ability to cure violations.	This may help with hyper-technical claims, but the primary claims—including for meal/rest premiums—are disputed and not subject to immediate cure.
The ballot initiative may not pass, so it is better to take the win.	We need something that is not a half-measure.

CAUTION: We are still assessing the proposed bills, which may change. We cannot come to any conclusions until we know what, if anything, is enacted.

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PAGA Reform
What are the changes?

The bills will overrule several unfavorable court decisions:

Current Rule	Case	Proposed Rule
If the PAGA plaintiff experiences one violation, he/she can sue for violations of any statute.	CA Court of Appeal (2018)	The PAGA plaintiff can only sue for violations that he/she personally suffered.
If the PAGA plaintiff is aggrieved, the violation can occur outside the one-year statute of limitations.	CA Court of Appeal (2021)	The PAGA plaintiff must have suffered a violation within one year.
There is no manageability requirement.	CA Court of Appeal (2022)	Court can "limit the evidence to be presented at trial or ... the scope of any claim ... to ensure that the claim be effectively tried."

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PAGA Reform
What are the changes?

There will be greater opportunities to "cure" alleged PAGA violations:

- Some violations may be cured within 33 days of the PAGA letter.
- But the most common claims are not currently subject to cure.
- The bills allow an employer to cure a broader set of claims including:
 - Wage statements;
 - Meal periods/rest breaks;
 - Minimum wage;
 - Overtime wages; and
 - Expense reimbursement

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PAGA Reform
What should I do?

- This law helps you only if you get sued; but don't get sued!
- Get HR/legal help to ensure that you comply with California wage and hour laws.
- Common issues:
 - Meal and rest breaks
 - OT and OT rates
 - Recording all hours worked
 - Proper pay stubs

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AB 1870
Workers' Compensation Poster Update
Requires workplace poster to notify employees of their right to consult a licensed attorney to advise them of their rights.



Effective 1/1/25





Background Checks - Criminal History (SB 1345)

- Would prohibit hiring employers from considering applicant criminal histories.
- Narrow exceptions for "business necessity" which would be difficult to meet.

- Still pending in legislature (not passed into law yet)





Arbitration of Disputes



A Few Notes on Arbitration



Trend in Courts

- Compel arbitration of "individual PAGA claim"
- Stay representative PAGA claims (with some exceptions, largely in state court)
- Representative PAGA claim litigated after conclusion of individual arbitration



A Few Notes on Arbitration



- **Make sure to pay your arbitration fees on time!**
 - CCP 1281.98: If fees and costs are not paid within 30 days after due date, drafting party is in material breach of the arbitration agreement and **waives its right to compel arbitration.**
 - Can subject waiving party to fees / sanctions.
- **Consider including information in your arbitration agreement regarding timing of payment**
 - CCP 1291.97: "Absent an express provision in the arbitration agreement stating the number of days in which the parties to the arbitration must pay any required fees or costs, the arbitration provider shall issue all invoices to the parties as due upon receipt."





A Few Notes on Arbitration

Cornejo v. Big Lots Stores, Inc.
(E.D. Cal. May 20, 2023)

- Putative class members who signed arbitration agreements are excluded from the class.
- Even those who signed arbitration agreements after the class action was filed are also excluded from the class.




Wage and Hour – Timekeeping




Timekeeping – Attestations

Corral v. Staples the Office Superstore LLC,
2023 WL 2347445, at *13 (C.D. Cal. Feb. 6, 2023)
Rivera v. Ryder Integrated Logistics, Inc.,
2022 WL 18337695, at *11 (C.D. Cal. Dec. 27, 2022)





- Recent court decisions demonstrate that employee attestations regarding time entries and meal/rest breaks can help limit, or defeat, class and PAGA claims.



Timekeeping – Rounding

- **Old Rule:** rounding policies ok if neutral effect on employees.
- **New Trend:** Appellate court found rounding **not permitted** when employer **has tech to capture exact time worked**, even if the policy is neutral.
 - California Supreme Court to weigh in.




Timekeeping – Rounding

Woodworth v. Loma Linda University Medical Center
(Fourth Appellate District, July 24, 2023)

- Labor Code "is concerned with small things ..."
- If the timekeeping system has to take "the extra step" of rounding time entries, then "there were no clear efficiencies gained."

Takeaway: Examine small amounts of time

- Rounding, security checks, health checks, computer boot-up time, password authentication time, etc.
- Regular, reoccurring off clock tasks involve high risk of liability




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Timekeeping – Off-the-Clock Work

Huerta v. CSI Electrical Contractors, Inc. (Cal. Mar. 25, 2024)

- Awaiting and undergoing **mandatory vehicle inspection** when exiting employer worksite constitutes **hours worked**.
- **Driving on employer's premises** in personal vehicle before or after shift is **not compensable hours worked**, even if subject to employer's rules during the drive, like rules prohibiting ear pod use, smoking, stopping on the road, passing other drivers, horseplay, anti-discrimination.
- When CBA exempts employees from state meal period requirements, employee must be paid minimum wage for on-duty meal periods.



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New Indoor Heat Rules



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Indoor Heat Regulations

- Reduce temperature below 82 degrees when employees need to wear clothing that restricts heat removal.
- Reduce temperature and heat index to below 87 degrees when employees are present.
- “For purposes of this section, preventative cool-down rest period has the same meaning as ‘recovery period’ in Labor Code subsection 226.7(a).”
 - Unlimited amount of cool-down breaks each shift
 - At least five minutes in duration
 - Access to adequate cool-down areas
 - Premium wages paid at the regular rate for all violations





Indoor Heat Regulations

- Must measure/monitor temperature with thermometer.
- Must develop a written procedure
- Must train workers and supervisors
- <https://www.dir.ca.gov/dosh/heatillnessinfo.html>



More Updates...



REMINDERS


- Make sure you are paying your **exempt employees** a salary that is at least 2x the CA minimum wage
 - CA law requires that exempt employees be paid 2x CA minimum wage
 - January 1, 2024, CA hourly minimum wage increased to \$16.00
 - \$1,280 per week, or **\$66,560** annually
- Deadline for CA Pay Data reporting was MAY 8, 2024
 - <https://pdr.civilrights.ca.gov>

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NEW Wage Theft Prevention Act Notice

Labor Code 2810.5 for non-exempt employees


- New form 2024:
https://www.dir.ca.gov/dlse/lc_2810.5_notice.pdf
- Includes new sick pay info and also "**emergency of disaster disclosure**."
 - <https://www.caioes.ca.gov/office-of-the-director/policy-administration/legal-affairs/emergency-proclamations/>
 - <https://www.fema.gov/locations/california#declared-disasters>



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Covenants not to Compete



- Two new California laws
- Noncompete agreements are **UNLAWFUL** in California
- Employers cannot require or attempt to require them
- California will not enforce noncompetes entered into in other states



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Covenants not to Compete – NOTICE TO EMPLOYEE

- By February 14, 2024, employers must notify current and former employees that the noncompete clause or agreement is void.
- Must notify employees with noncompetes who were employed on or any time after January 1, 2022.
- Must be by letter and email.





FAQs Covenant not to Compete

- Do covenants not to compete include nonsolicitation of **customers** clause?
 - Yes BUT can prohibit nonsolicitation using trade secrets
 - Customer lists can be trade secrets sometimes
- Do covenants not to compete include nonsolicitation of **employees** clause?
 - Unclear but risky to continue including them
- Uh oh. I didn't send the required notice in February. Should I do so now anyway?
 - YES



Workplace Violence Prevention Program (WVPP)

- SB 553 – Adds Labor Code section 6401.9
- Employers must implement written WVPP
- July 1, 2024 deadline
- Applies to virtually all California employers
- Employee involvement in developing and implementing
- “[S]pecific to the hazards and corrective measures for each work area and operation”



Workplace Violence Prevention Program (WVPP)

- **Non-Active Procedures**
 - Assessing workplace violence risks
 - Implementing strategies to reduce workplace violence risks (physical and procedures)
 - Investigating incidents and concerns
 - Violent Incident Log
 - Multi-Employer Worksites
- **Active Procedures**
 - Alert
 - Evacuation or sheltering
 - How to obtain help during emergency

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WVPP – Training

WHO:

- All employees

WHAT:

- Each employee must understand the plan, procedures, and their roles
- Training materials – content and vocabulary to the educational level, literacy, and language of employees should be used
- An opportunity for interactive questions and answers with a person knowledgeable about the employer’s plan

WHEN:


- When first established
- Annually
- Previous unrecognized hazard

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Frivolous Lawsuits

Q: A former employee filed a frivolous discrimination lawsuit against my company. Can we sue him to recover fees and costs?

A: Probably not. Lawsuit must be “objectively frivolous.”



- *Neeble-Diamond v. Hotel California By The Sea, LLC*

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Ogletree Deakins | **Thank you!**



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About the Firm

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters.

The firm has more than 900 attorneys located in 54 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.



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