

# Navigating the Pitfalls of PAGA



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# Private Attorneys General Act (PAGA)



## ➤ **What is PAGA?**

- Allows employees rather than state officials to enforce provisions of California's Labor Code

## ➤ **Who Can Sue?**

- Employee who suffered a violation of a law related to wages and hours, or workplace health and safety

## ➤ **Scope of Claim?**

- The violations against the plaintiff and Labor Code violations against other employees

## ➤ **Potential Liability?**

- For each employee at issue, \$100 per pay period in which they suffered the violation, plus attorney fees and costs

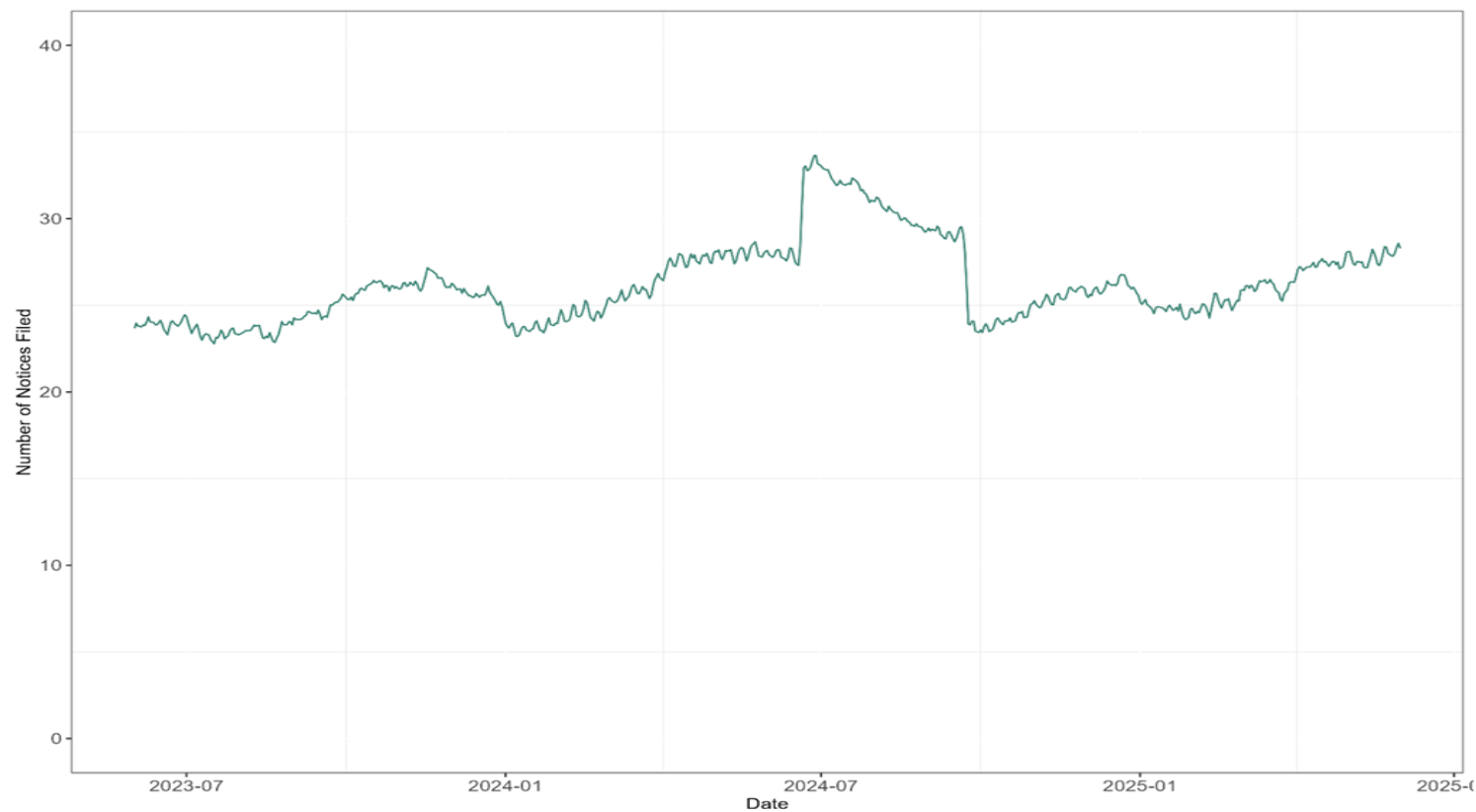
# Private Attorneys General Act (PAGA)

## Significance of PAGA Claims/Laundry List of Problems (Many Pre-Reform Issues):

- Technical Violations Create Liability
- Representative Standing/Plaintiff Need Not Have Suffered All Violations
- Many Claims May Stand Despite No Actual Injury or De Minimis Violations
- Immune from Arbitration
- Relative Ease to Bring and Maintain Claims
- Less Restricted Discovery
- Legal Uncertainties
- Plaintiff-Friendly Jurisprudence
- High Liability (Average of \$1 M per Case)
- Individual Defendants & Public Entities May Be Liable



# PAGA Litigation Trends (Pre and Post Reform)





# Political Background of PAGA

## ➤ **Enacted in 2003**

- Signed by Governor Gray Davis on eve of recall
- Sponsors: labor unions, California Rural Legal Assistance (CRLA)

## ➤ **Only modest reforms in 20 years**

- Additional reporting requirements
- Several changes to “right to cure” provisions
- CBA carve-outs for construction, janitorial industries


## ➤ **All other bills died or did not get a hearing. Examples:**

- Adding sentence to notice about whether alleged violations are eligible for cure
- Relief from PAGA during COVID for meal/rest where worker is remote
- Additional details in PAGA notice
- Relief from penalties where employer shows they followed DLSE guidance

# 2021-2024 Efforts by Business Community

- 2024 Ballot Measure: California Fair Pay and Employer Accountability Act
- Fix PAGA Campaign

**Fix** PAGA



Assemblymember  
**Esmeralda Soria**  
is a champion for  
California workers

Now it's time to fix PAGA to create a better, fairer and faster system for workers

According to the Labor Commissioner's office, California's lawsuit-first system for labor disputes, known as PAGA, has fallen "short of protecting the interests of the state and workers."

The State Legislature should fix PAGA to expand on existing Labor and Workforce Development Agency processes, which are proven to resolve employee claims faster and provide workers with more restitution.

**Legislative reforms should build a better process that will:**

- ✓ Resolve worker disputes faster
- ✓ Ensure more money goes to workers instead of lawyers
- ✓ Reduce the need for costly, abusive lawsuits

**Fix PAGA** Thank Assemblymember Soria for protecting workers and urge her to reform PAGA.

[www.FixPAGA.com](http://www.FixPAGA.com)

# 2024 PAGA Reform

Deal between Newsom Administration, legislative leaders, labor and business community in light of 2024 Ballot Measure to repeal PAGA

FOR IMMEDIATE RELEASE

Tuesday, June 18, 2024

Governor's Press Office: (916) 445-4571

## Governor Newsom & legislative leaders announce agreement on PAGA reform

**What you need to know:** Labor and business groups reached an agreement on PAGA reform that strengthens worker protections, encourages employer compliance, streamlines litigation processes, and averts a contentious ballot measure.

**SACRAMENTO** — Governor Gavin Newsom, in partnership with legislative

# Three Primary Improvements



## ➤ **Penalty Modifications**

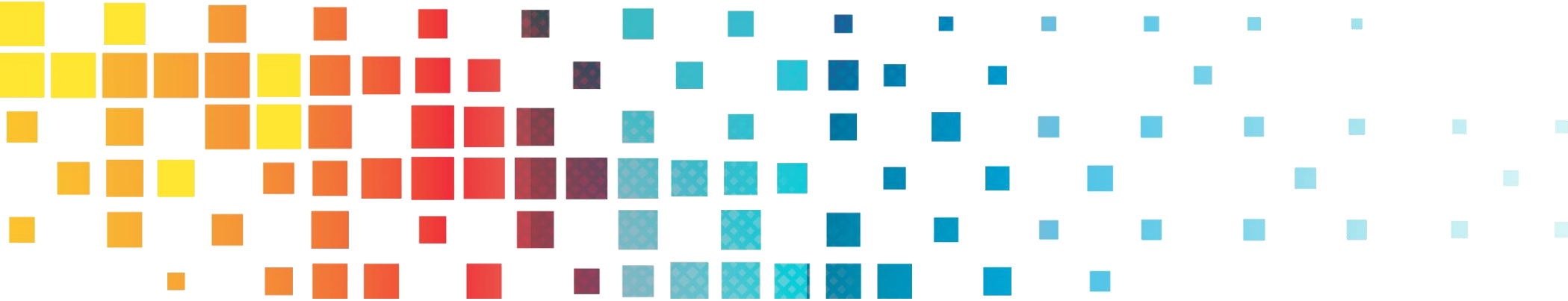
- Including potential penalty reduction of **85 percent** or more if employers take “all reasonable steps” to comply with the law
- Major opportunities and challenges for staffing companies/PEOs

## ➤ **Litigation Relief**

- Standing
- Manageability
- Derivative Claims

## ➤ **Expanded and Robust Right to Cure Process**

- Varies by size of employer
- Presents early resolution opportunity



# Penalty Modifications



# Penalty Modifications

- **\$100** per employee per pay period is the default
- **\$50** per employee per pay period for violations from an **isolated, nonrecurring** event that did not extend beyond lesser of **30 consecutive days** or **four consecutive pay periods**
  - Intended to address things like sporadic instances of meal period non-compliance, rest-period non-compliance and/or an instance where there was an anomaly in payroll processing for less than four consecutive pay periods
- **\$25** per pay period for 226 violations if:
  - Employee would not be confused or misled about the correct identity of the employer
  - Employee could promptly and easily determine the accurate information from the wage statement alone

# Penalty Reduction for Taking “All Reasonable Steps”



## ➤ Prior to Records Request or LWDA Letter

- Civil penalty is **not more than 15 percent** of penalties otherwise available if the employer (prior to records request or LWDA letter) took **all reasonable steps** to be in compliance all provisions identified in the notice

## ➤ “All reasonable steps” include:

- Conducted periodic **payroll audits** and took action in response
- Disseminated lawful written **policies**
- **Trained** supervisors on legal compliance
- Took **appropriate action** with regard to supervisors

# Penalty Reduction for Taking “All Reasonable Steps”

## ➤ After LWDA Letter

- Civil penalty is **not more than 30 percent** of penalties otherwise available if the employer (within 60 days of LWDA letter) took **all reasonable steps** to prospectively be in compliance all provisions identified in the notice

## ➤ “All reasonable steps” include taking an action to initiate:

- Conducting an **audit** of the alleged violations and taking action in response
- Disseminating lawful written **policies** as to the alleged violations
- **Training** supervisors on legal compliance
- Taking **appropriate action** with regard to supervisors

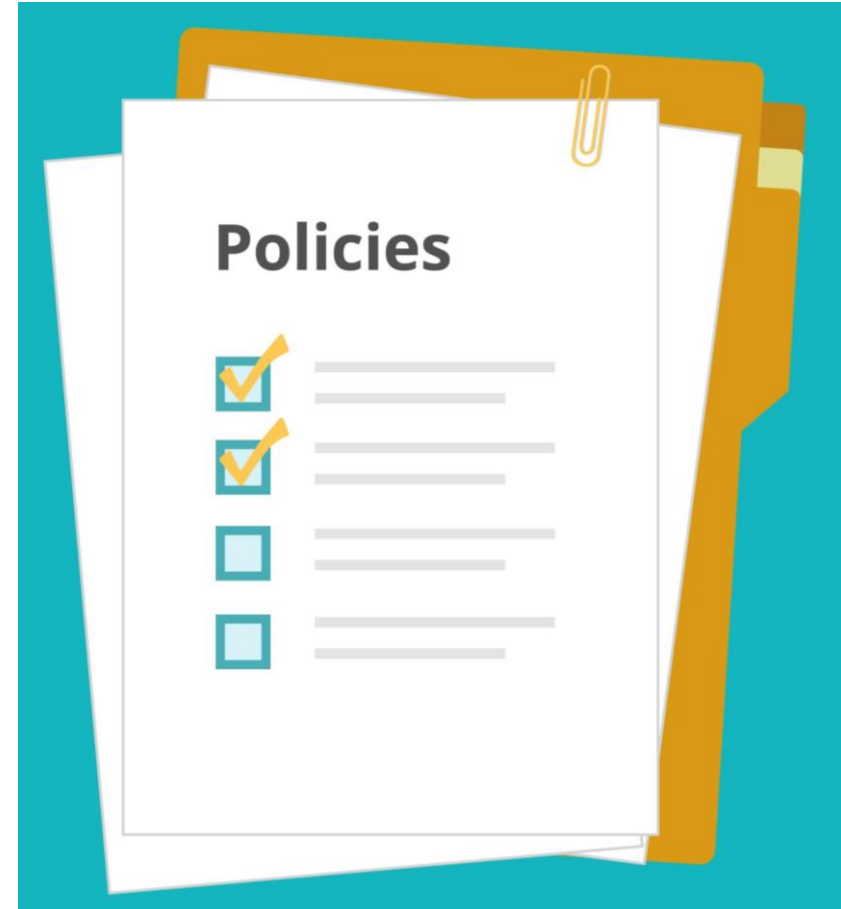


# “All Reasonable Steps” – Valuable Tool

- Whether the employer’s conduct was reasonable shall be evaluated by the totality of the circumstances and take into consideration the size and resources available to the employer, and the nature, severity and duration of the alleged violations
- The existence of a violation, despite the steps taken, is insufficient to establish that an employer failed to take all reasonable steps
- Penalty reductions not available for heightened penalties

# “All Reasonable Steps” – Policies

- Annual reviews of handbooks and other policies addressing timekeeping, meal and rest periods, overtime, reimbursement of expenses, incentive pay, among other wage and hour topics are a standing recommendation
- Under the new statute, a **review**, **revision**, and **distribution** of policies are all actions that can count towards “all reasonable steps”
- Implement acknowledgment process to keep for company’s records and in personnel files





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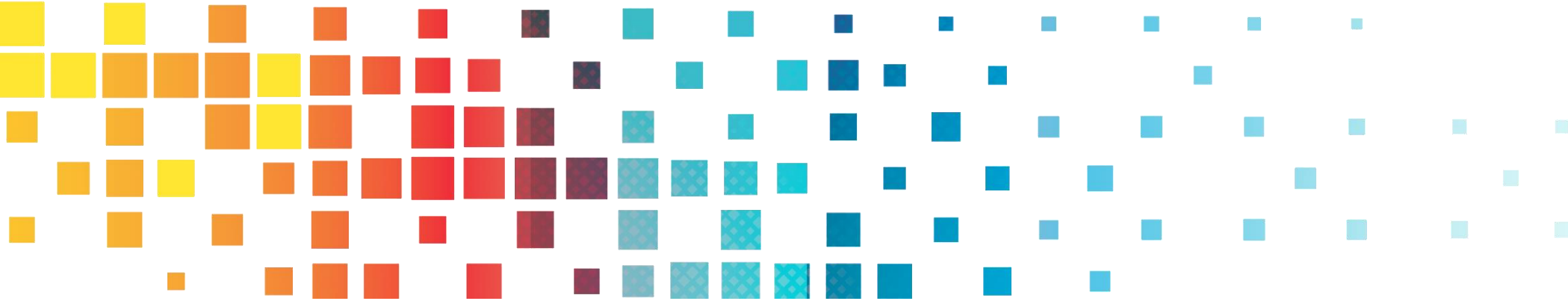
# “All Reasonable Steps” – Training

- No longer just for supervisors and managers
- Typically, the training will follow distribution of revised policies
- Don't forget to keep documentation of training provided such as presentation materials and sign-in sheets



# “All Reasonable Steps” – Audit and Action

- Audits include a review of actual **practices** – but beware of what you may find
- Recommend consulting with counsel on best process for conducting audit and document findings
- Once audit completed, then there needs to be **action** to change policies (if not already done) and **practices** to address issues
- Example: meal periods consistently taken after the 5th hour of work could be addressed by reminding non-exempt employees and supervisors of the company’s policies, providing training, counseling those who violate policy, and conducting follow up audits to ensure actions taken correct the issue



# Litigation Relief



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# Litigation Relief – Standing Issues

- Limits an individual standing to allowing pursuit of relief for only those employees “**against whom a violation of the same code provision was committed.**”
- This means that the employee personally suffered the same purported violations as other alleged aggrieved employees.



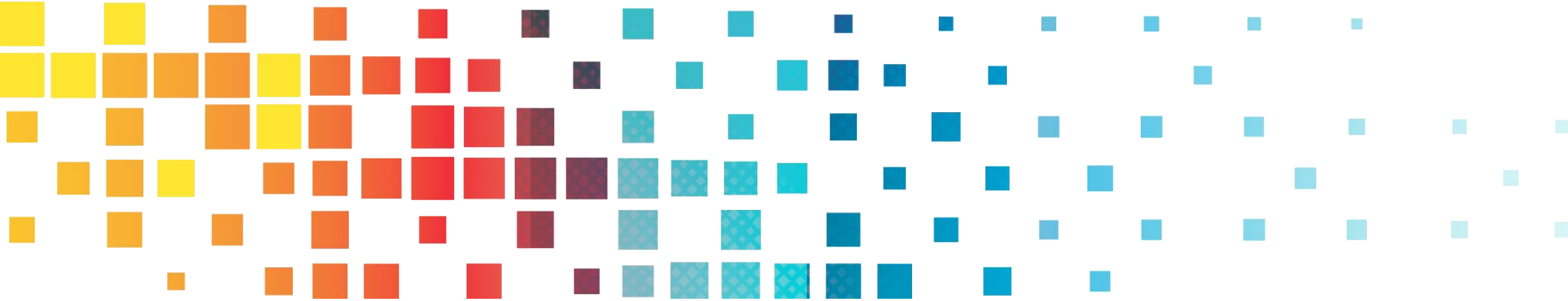
# Litigation Relief – Manageability

- Codifies a trial court’s ability to limit evidence at trial and (more importantly) to **“limit the scope of any claim pursuant to this part to ensure that the claim can be effectively tried.”**
- The inclusion of this code section now allows a procedural mechanism to allow employers, prior to trial, to motion the court to seek limitations of the scope of the aggrieved employee population



# Litigation Relief – Derivative Penalties

- Prohibits an employee from seeking to **combine** PAGA penalties for:
  - Violations of Labor Code Sections **201, 202, 203** and violations of Labor Code Section **204** that are neither willful or intentional
  - Violation of California Labor Code section **226** that is neither knowing or intentional nor a failure to provide a wage statement
- This curbs attempts in PAGA litigation to double-dip or combine the number of penalties that are sought in litigation (but not complete prohibition of this concept)



# Enhanced Cure Process



# Enhanced Cure Process

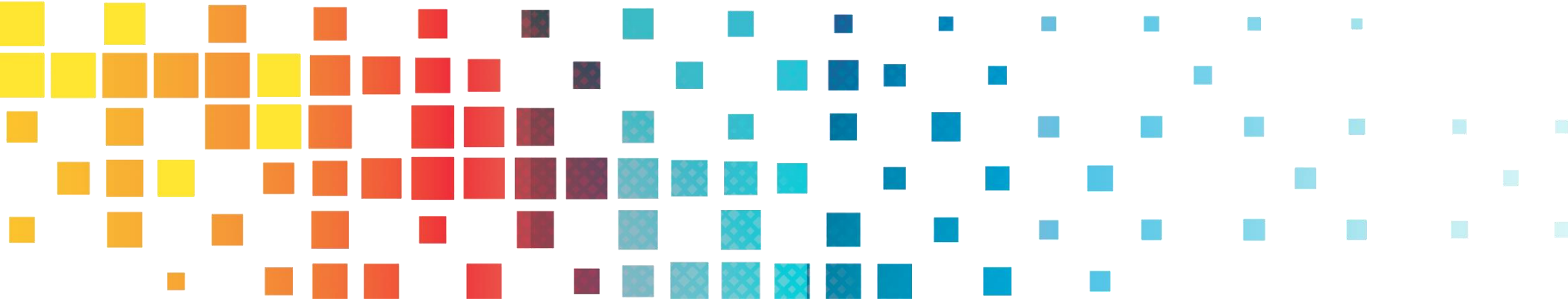
- Within 33 days of receipt of a notice from the LWDA, an employer with **fewer than 100 employees:**
  - May submit a confidential proposal to cure one or more of the alleged violations
  - Process includes a multi-step review process with the LWDA
  - All communications as part of this process are intended to be privileged settlement communications that could not be introduced in court



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# Enhanced Cure Process

- Employers with **100 or more employees:**
  - Can seek an early evaluation conference in court once the PAGA lawsuit is filed
  - The employer will file an application indicating whether it intends to cure any or all of the alleged violations and the process it has/shall undertake
  - Multi-step process for a civil court's review of a large employer's cure process



# Windfall for Employer? Not So Fast...



# What Did the Other Side Get?

## ➤ Heightened Penalties

- **\$200** per employee per pay period if either an agency or court issued a **finding/determination** that employer's policy or practice giving rise to the violation was unlawful (within 5 years preceding violation) OR employer's conduct was **malicious, fraudulent or oppressive**

## ➤ Exceptions To Penalty Reduction:

- Allows a court to refuse to apply the penalty reductions if the facts and circumstances of a case warrant or to do otherwise would be unjust, arbitrary, oppressive or confiscatory

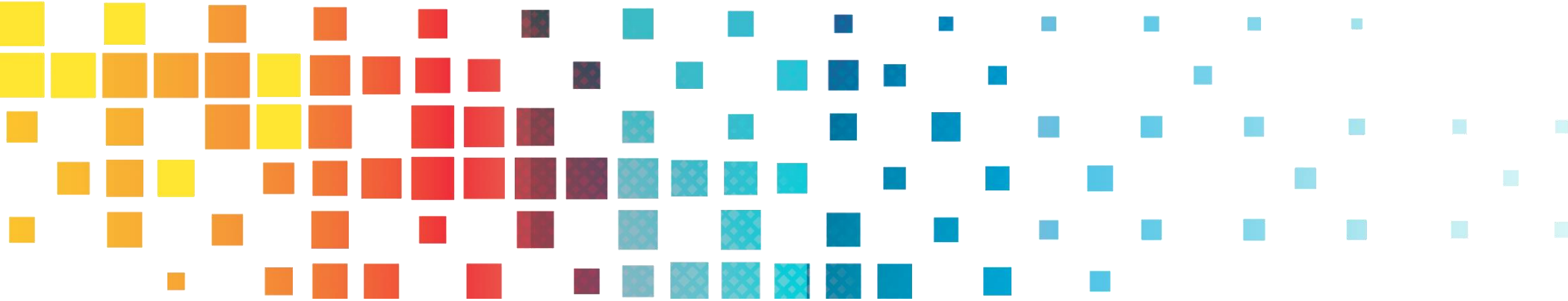
## ➤ Non-Profit Legal Aid Organizations Can Bring Claims For Employees:

- Allows for certain non-profit legal aid organizations to file PAGA lawsuits on behalf of aggrieved employees or serve as counsel of record on behalf of one or more current or former employees



# What Did the Other Side Get?

- **Injunctive Relief:** Permits an aggrieved employee to seek injunctive relief in PAGA litigation
- **Attorneys' Fees And Costs Possible In Response To "Cure":** If an employer seeks to utilize the cure provisions under PAGA for wage violations, an employee will now be entitled reasonable lodestar attorneys' fees and costs to be determined by an agency or court, even when a cure is proper and civil litigation is avoided

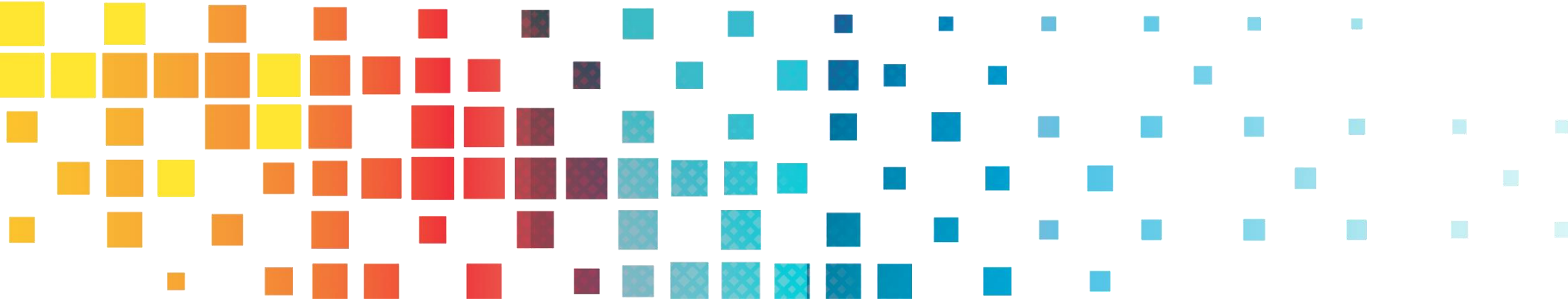


# Current Trends in Litigation



# Trends

- Seemingly little impact on the number of PAGA filings
  - TBD: Impact of newly proposed PAGA Regulations
- Concrete impact on how PAGA cases are litigated, particularly with regard to reviewing and attacking the LWDA letter, early evaluation conferences and taking advantage of the standing/manageability defenses
- Little data thus far, but some impact on settlement value
- Employers should ensure they are taking “All Reasonable Steps” including policy review, audits, and follow up action provide clear guidance and opportunity



# Hot PAGA and Class Action Litigation Issues



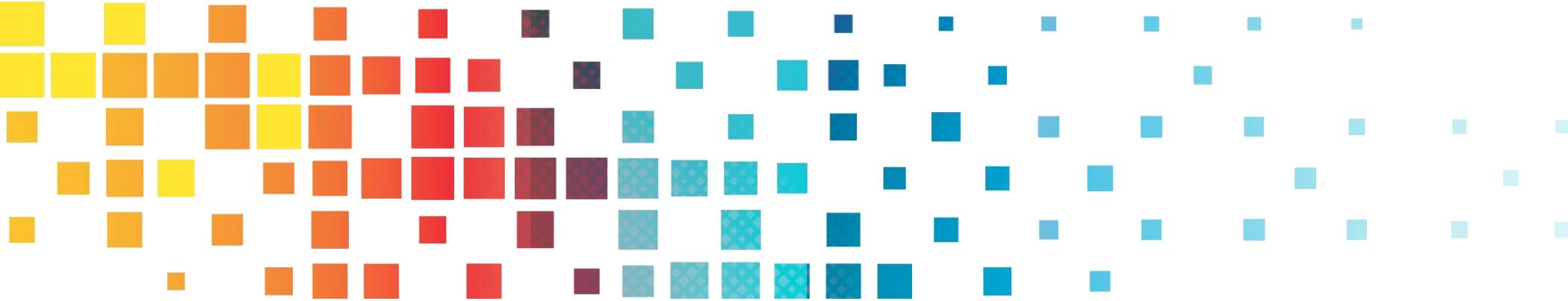
# Hot PAGA Issues

- **Regular rate issues in overtime weeks**
  - Bonuses, commissions, dual rates
- **Misclassification of workers: contractors vs. employee, exempt vs. non-exempt**
- **Expense reimbursements**
- **Meal/rest period compliance**
- **Off-the-clock issues**
- **Wage statements**

# How to Mitigate Liability on These Issues

- Evaluate arbitration and implement agreements
  - Headless PAGA
- Audit wage/hour practices and keep privileged information with counsel
- Implement strong meal/rest break compliance SOPs
- Draft strong policies and job descriptions
- Train managers on the pitfalls and impose discipline accordingly





# I've Received a PAGA Letter...



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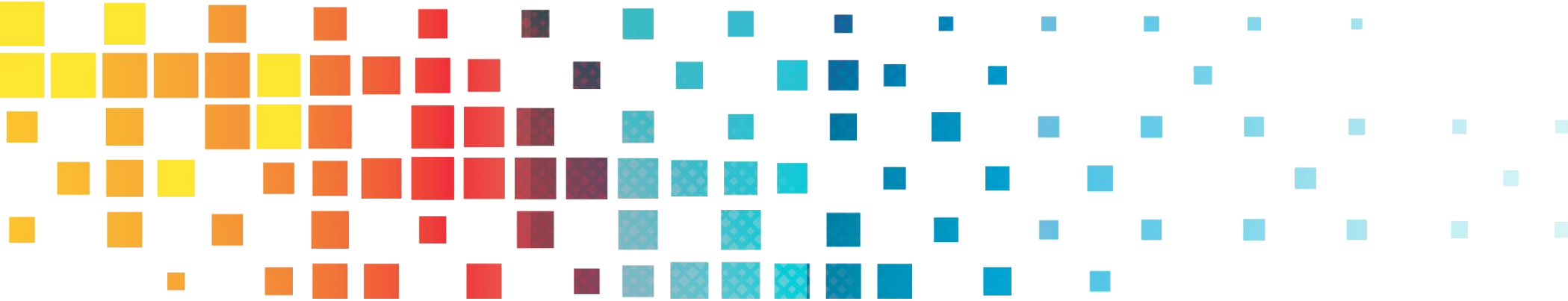
# PAGA Audit Under PAGA Reform Law

- Immediately conduct an audit and take “all reasonable steps” to take advantage of civil penalty reductions
- Other steps...



# Ten Steps

1. Contact labor and employment counsel
2. Audit of wage and hour practices
3. Make necessary corrections
4. Determine if a “cure” is warranted
5. Audit timekeeping, payroll records, and practices and alleged violations
6. Determine if the employee is aggrieved
7. File employer’s response with the LWDA
8. Gather counterintelligence
9. Review the employee’s personnel file
10. Assess early settlement



# Oh No... I've Been Sued. Now What?



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# The Seven Steps

1. Understanding the Complaint
2. Honest Evaluation
3. Coordination Within the Company
4. Setting the Strategy
5. Dealing with Discovery
6. Considering Settlement
7. Fixing Problematic Practices



# Step 1: Understanding the Complaint

➤ **Investigate** the allegations

- What violations are being alleged?
- Which employees are alleged to be affected?

➤ **Are there groups of employees or potential violations that, while not apparent on the face of the complaint, could be the subject of discovery?**



## Step 2: Honest Evaluation

- **Evaluate** the legal merits of the case, which includes:
  - Evaluation of underlying allegations of unlawful conduct
  - Evaluation of strengths and weaknesses
- **Consider any threshold issues that could short-circuit plaintiffs' case, such as:**
  - **Arbitration agreements (especially with class waiver)**
  - Plaintiffs are not the company's employees
  - Personal jurisdiction issues
- **Evaluate** the logistical issues in defending a complex wage and hour action.
  - Accurately maintained records
  - Ability to gather group-wide information
  - Ability to respond to group-wide discovery demands



# Step 3: Coordination within the Company

- **Coordinate** among departments to ensure that counsel have access to the proper information necessary to investigate and defend the case.
  - Payroll Department
  - Human Resources
  - IT
  - The business line(s) of putative class members



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# Step 4: Setting the Strategy

- **Determine company's defenses on the merits of the alleged violations**
- **Limiting the scope**
- **Early settlement**
- **Merge legal strategy** with a big-picture view of the company's business to determine what should be achieved, and how counsel can best go about achieving it.

# Step 5: Dealing With Discovery

- **Counsel must be attuned with discovery demands **and** the discovery the company should be seeking.**
- **For example, a common discovery issue is whether, and to what extent, defendants should be limited to “representative discovery”**
- **In-house and outside counsel must be on the same page as to the benefit of additional discovery versus the cost of such discovery.**
- **It does the company no good if the value of the discovery sought is outweighed by its costs.**



# Step 6: Best Time For Settlement

Is there an **opportune time to settle?**

- Because these cases often proceed in stages, settlement should be re-evaluated after each stage is complete.
- The results of the previous stage of the litigation often soften the parties' positions.
- Settlement that once may have seemed impossible may become much more likely as litigation progresses.



# Step 7: Fixing Problematic Practices

Often, the action will **highlight** that the company is not fully compliant in its wage and hour practices.

- Taking all reasonable steps is critical and any resolution of the case should also involve prompt action to address any problematic wage and hour practices - both those that are the subject of the litigation, and any others that are uncovered.
- Otherwise, the company will likely face yet another similar action.
- Counsel must weigh how changing pay practices during the pendency of litigation could affect the case. In-house counsel will need to determine the best steps for bringing the business on board in making these (sometimes uncomfortable) changes.

# Partner With FP

## California Class Actions and PAGA

**Overview**   *Insights*

Defending against class and collective action litigation in California requires a comprehensive and strategic approach. As a state known for its employee-side protections and active legal environment, class and collective action litigation presents significant potential exposure for businesses, no matter the size. Wage and hour litigation is continually evolving, and staying ahead of the curve is key to presenting a strong defense. Our experienced legal team is dedicated to protecting your interests by developing tailored defense strategies that mitigate exposure and minimize liability.

In addition to class and collective actions, in California, Private Attorneys General Act [PAGA] lawsuits pose a unique and serious threat to employers. Unlike other federal and state laws, PAGA authorizes

### Key Contacts



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# Partner With FP

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## PAGA Reform and Audits

### WHAT IS PAGA?

California's **Private Attorneys General Act (PAGA)** allows employees to file lawsuits on behalf of themselves, other employees, and the State for Labor Code violations. Since its enactment in 2004, PAGA claims have posed a unique and serious threat to employers in California – often appearing alongside class action claims and bypassing arbitration. The **penalties can be staggering**, as they apply **per pay period, per employee** – making businesses easy targets for costly litigation.

### WHAT'S NEW?

Thanks to the PAGA Reform of 2024, **employers now have more opportunities to defend against PAGA claims—if they take “all reasonable steps” to comply with the Labor Code.** While this reform includes a penalty reduction scheme for employers who take reasonable steps to comply before and after being notified of an alleged PAGA violation, the term “reasonable steps” isn't defined.

That said, all reasonable steps may include payroll audits and corrective actions based on findings; clear, written policies that align with labor laws; supervisor training on Labor Code and wage order compliance; other corrective action as to supervisors; and swift responses to alleged violations.

*When evaluating whether an employer's efforts are reasonable, the law considers factors like company size, available resources, and the nature, severity, and duration of the alleged violations.*

### HOW CAN EMPLOYERS RESPOND?

The best way to minimize risk? Be proactive. Fisher Phillips can help you take all reasonable steps to ensure compliance and reduce potential penalties. We can work with you to:

- **Assess and monitor** compliance with customized strategies.
- **Conduct audits** to systematically review payroll processes, employee classifications, and workplace policies to help ensure compliance and, if necessary, correct potential violations.
- **Develop, review, and update** wage and hour policies and employee classification schemes. We can also supply you with template policies and procedures.
- **Train employees and managers** on compliance requirements, emphasizing the importance of accurate timekeeping and adherence to labor laws. We can also provide template policies and procedures for your use.

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# Questions



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# Thanks!



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