Ridgemark Insurance Services

MARCH 2022 | VOLUME 3 | ISSUE 3

NEWSALERT

Private Attorneys General Act

State Law Has Employers on the Defensive

THE WAY courts have interpreted a California law – the Private Attorneys General Act (PAGA), which has been on the books for 18 years – has led to an explosion of lawsuits against employers during the last few years.

The law has generated more than 20,000 lawsuits since 2017 at an average cost of $1.1 million per case, according to one study.

PAGA permits employees to sue for civil penalties on behalf of themselves, fellow workers and the state for alleged labor code violations. If a suit is successful, the state receives 75% of the damages with the employee receiving the balance.

As a result, California employers face increasing litigation uncertainty that traditional insurance may do little to mitigate.

The employee in essence acts as the state's watchdog; he or she need not suffer any actual harm from an alleged violation in order to file a lawsuit. One employee has the ability to file a suit alleging multiple labor code violations.

The result? An average of 15 PAGA notice letters arrive at the California Labor and Workforce Development Agency daily.

How did we get here?

The law was enacted in 2004 to improve California Labor Code enforcement by empowering employees to pursue violations when the state has insufficient resources to pursue them.

The growth in litigation started after a California Supreme Court decision in 2009, holding that PAGA suits did not have to meet the certification requirements that apply to class-action lawsuits.

Litigation activity jumped significantly again in 2014 after the state Supreme Court held that employees could not waive their rights to file PAGA claims when they reach arbitration agreements in disputes with their employers.

Three years later, the court ruled that employees were generally entitled to request and receive large amounts of information from employers early in the litigation.

The high cost of providing the information gives employers an incentive to settle claims quickly.

Finally, an appellate court ruling in 2018 gave employees the right to sue over alleged violations that do not directly affect them, so long as at least one violation does.

What's being claimed?

Typical PAGA Claims

- Claims for unpaid off-the-clock work during meal periods,
- Claims for misclassifying employees as independent contractors, and
- Claims for rounding employee time entries.

PAGA claims can also involve allegations of discrimination, retaliation and failure to protect the health and safety of employees. There are even COVID-19-related claims.

One allegation triggers multiple other ones related to the first, such as failure to pay all earned wages, failure to pay wages in a timely manner, and so on.

One potential bright spot: In December 2021, the U.S. Supreme Court agreed to consider whether California employers may enter voluntary agreements with employees in which the employee agrees to pursue only their individual claim and not bring a PAGA claim. A decision is expected this summer.

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Sexual Harassment Prevention

Don't Forget Remote Workers in Training, Rules

IF YOU have staff working from home as a result of changes wrought by the COVID-19 pandemic, you still need to stay on top of your obligations to protect all of your workers from sexual harassment.

Not being physically in the office doesn't seem to have had an effect on employee sexual harassment as employers paid out more than $65 million in sexual harassment settlements and court awards in 2020, according to the Equal Employment Opportunity Commission.

While most workplace sexual harassment has historically taken place in person at the workplace, a good portion has migrated online in the form of harassment by workplace collaboration apps, e-mail, chat and texting. Just because you can't see the harassment, doesn't mean it's not happening.

Most companies, while they likely have policies prohibiting sexual harassment in the workplace, have not updated their policies to include online harassment. And that can leave them exposed to lawsuits by staff who feel they've been harassed by a manager, supervisor, co-worker – or even a customer.

If you have employees, you need to make sure that you have strong policies in place that reach beyond the physical worksite.

What you can, and should, do

Review your sexual harassment prevention policies and training and update them to include employees working remotely. Make sure you have buy-in from management and supervisors for your prevention policies and training to be truly effective.

Remember too that all California employers with five or more workers must conduct two hours of sexual harassment prevention training to all supervisors and one hour of training to all non-supervisor staff six months after being hired, and every two years after that.

The state requires that the training include the following:

- Information and practical guidance regarding federal and state law concerning the prohibition against, and the prevention and correction of, sexual harassment and the remedies available to victims of such harassment.
- Practical examples of harassment, discrimination and retaliation.
- Information about preventing abusive conduct and harassment based on sexual orientation, gender identity and gender expression.
- Procedures for employees to file a complaint of sexual harassment, as well as the company's steps for dealing with complaints.
- Appropriate remedial steps to correct harassing behavior, including the employer's obligation to effectively investigate harassment.

The law also requires employers to have in place a written sexual harassment prevention policy that must also be distributed to your staff. You are also required to post sexual harassment prevention posters in the workplace.

You should approach workplace harassment prevention with extreme care to reduce the risk of lawsuits, agency charges and penalties, and other fallout. Not only is training employees on sexual harassment in the workplace required by California employment law, but it is also arguably the first and foremost best practice in preventing legal risks associated with sexual harassment.

Take reasonable steps, such as policy assimilation and training, to prevent discrimination and harassment from occurring. You should prohibit not only sexual harassment but also gender harassment and harassment based on pregnancy, childbirth, breast-feeding and related medical conditions.

If harassment does occur, you must take effective action to stop any repetition and to correct any effects of the harassment. ❖

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EPLI Policies Typically Exclude PAGA Claims

Insurance implications

One issue for employers is that employment practices liability insurance typically won't cover wage and hour disputes or significantly sublimit the amount of coverage available for defense costs only.

Also, EPLI policies usually carve out coverage for wage and hour claims under PAGA representative actions.

Directors and officers liability policies exclude wage and hour claims.

One option is wage and hour insurance, which most likely would provide defense and indemnity coverage for PAGA claims that allege violations of wage and hour laws and regulations.

However, these policies are expensive and usually have quite high retentions, which could price out most smaller employers. ❖

Don't Let a Subcontractor Derail Your Safety Efforts

ONE OF the biggest challenges construction business face is preventing subcontractors' and suppliers' poor or non-existent safety practices from denting their own safety program.

While you may consider a number of factors when vetting a new contractor or vendor, one area that is often overlooked is their workplace safety practices.

This mistake can cost you dearly if one of their workers causes an incident at your worksite. In addition to an injury to one of your own employees, you could get a visit from an Occupational Safety and Health Administration inspector.

The National Safety Council's Campbell Institute recently conducted a study of organizations with excellent safety records to identify the best practices for contractor and vendor safety.

As part of the study it identified five steps during a contractor or vendor relationship when it's incumbent on a hiring company to evaluate the workplace safety habits of their business partners.

Prequalification

The institute recommends looking at more than just a company's experience modification rate. It says safety-minded firms assess contractors in multiple areas, such as their total recordable incident rate, fatality rate, days away from work for injured workers, restricted or transferred rate, and other OSHA recordables for the last three years.

Many firms also ask for environmental reports, written safety programs, permits, licenses, and continuous improvement programs.

Pre-job task and risk assessment

Before a contractor begins work, institute members recommend having a method for evaluating the risk of the work that is to be performed. Doing this can help you understand the scope of the work and give you a chance to put into place a new written safety program if the risk is deemed high.

Most importantly, subcontractors should be required to adhere to the same safety standards as your company.

Training and orientation

You should require safety orientation and skills training for contractors before they step onto your jobsite. Also, if they are doing highly specific work, you should ensure they have any required permits or special training. Some of the jobs that fit into that category are confined-space entry, electrical work, hot work, energy control, forklifts, and elevated work.

Job monitoring

Many safety-minded companies monitor work with daily checklists, pre-shift tailgate or safety meetings and weekly walk-through inspections. Some of the companies surveyed for the study also require contract employees to submit a certain amount of safety observations and utilize mobile applications to report non-compliance or unsafe conditions.

Also, you need to keep up-to-date incident logs, as this is crucial to monitoring contractor safety during a project.

Post-job evaluation

Conduct a post-job evaluation. During this phase look at safety, customer service and the quality of the finished work, and use those factors in determining the contractor's eligibility for future contracts. ❖

Workplace Class-Action Lawsuits Are Spiking

CLASS-ACTION lawsuits by workers against employers have risen dramatically during the COVID-19 pandemic and settlement amounts have hit record levels, a trend that is likely to continue in 2022, according to a new report.

The report by law firm Seyfarth Shaw, LLP highlights the biggest litigation threats employers face in these unprecedented times of economic upheaval and a tight labor market. While the types of class-action lawsuits comprise a wide range of allegations, the report found four areas that were particular threats to businesses.

Statutory liability

Statutory suits included actions over breach of contract for employee benefits, antitrust law violations, and violations of anti-harassment and privacy laws. Class-action settlements jumped nearly seven-fold in 2021.

Much of that amount was to settle sexual abuse allegations against two universities. Large settlements were also reached for collecting fingerprint and handprint data without workers' consent, and over allegations that employers colluded to limit wages.

The COVID-19 pandemic inspired employee lawsuits as businesses attempted to bring workers back on-site or implement hybrid work arrangements, according to Seyfarth Shaw.

Employer vaccine and masking mandates produced employee pushback. It is too early to know how large future settlements will be, but the large numbers of affected employees suggest the overall amount will be sizable.

ERISA

Allegations that employers violated the federal Employee Retirement Income Security Act more than doubled last year.

Half the settlements were for alleged mismanagement of 401(k) plans. Alleged breaches of fiduciary duties (such as overpaying administrative fees) and underfunding plans made up the rest.

Wage and hour

Minimum wage hikes have made lost-wage cases more costly.

There is also more focus on firms' alleged misclassification of workers as independent contractors. The trend of employees working remotely because of the pandemic may also spawn claims that employers are not paying them for all the hours they work.

Total settlements for wage and hour class-action lawsuits more than doubled to $641 million, from $295 million in 2020.

Discrimination

This includes claims such as gender discrimination related to pay, and sexual harassment. There were also large settlements of age and racial discrimination claims.

Some COVID-19-related suits alleged discrimination based on disability or religious beliefs, as workers argued that their health status or religion precluded them from getting vaccinated.

There were also charges of retaliation against workers who raised concerns about workplace safety or who sought disability or religious accommodations.

Insurance issues

Businesses are vulnerable to employee lawsuits on any of these grounds, even when they take preventative steps. Even groundless lawsuits are expensive to defend and can result in hundreds of thousands of dollars in legal fees.

Employment practices liability insurance covers allegations of discrimination, harassment, invasion of privacy, and may cover claims of wage and hour violations.

Employee benefits liability insurance covers claims of mismanagement of benefit plans, while employee dishonesty insurance may cover thefts committed by plan administrators.

Umbrella or excess liability insurance policies provide additional coverage for these types of lawsuits.

Call us to find out about the available options.❖