



Coverage Gap

PAGA Case Insurance Recovery Chances Slim

THE AVERAGE cost for employers of a court case brought under the California Private Attorney General Act was \$1.1 million in 2021, according to the CABRIA Foundation. But the insurance policies that business owners would expect to cover legal costs, settlements and judgements for these claims may not provide much coverage.

PAGA allows an aggrieved employee to stand in the shoes of the California Labor and Workforce Development Agency to seek civil penalties against their employer on behalf of themselves, other employees, and the State of California for Labor Code violations. Many of the actions concern allegations of wage and hour infractions.

These claims can be costly for employers, including a potentially burdensome discovery process, as PAGA plaintiffs may request and receive a significant amount of information from the employer.

PAGA claims, however, are not limited to wage and hour claims. They can a multitude of labor law violations, including discrimination, retaliation and failure to protect the health and safety of employees.

TYPICAL PAGA CLAIMS

Claims typically allege wage and hour violations, such as:

- Unpaid off-the-clock work during meal periods,
- Misclassification of employees as independent contractors, and
- Rounding employee time entries.

Recent action

Employers did get a semblance of reprieve last year when the U.S. Supreme Court ruled that employers can compel arbitrations for employee-initiated PAGA actions, if they have signed arbitration agreements.

The court also held that if a plaintiff in a PAGA action is bound to arbitration, they automatically lose standing to prosecute claims on behalf of other “aggrieved” employees and remaining PAGA claims must be dismissed.

The court left one important question open: whether an employee compelled to arbitrate their individual PAGA claims loses standing under California law to pursue representative claims on behalf of other employees.

The California State Supreme Court is scheduled to hear a case to clear up this matter. If the judges rule that the case of an employee bound to arbitration can still proceed in court for the other employees they represent, it may render the U.S. Supreme Court ruling meaningless.

The insurance conundrum

That leaves employers in a difficult position in terms of their insurance coverage.

The first policy an employer would naturally turn to is their employment practices liability insurance (EPLI), since it is specifically designed to cover workplace actions by employees.

The other policy they may consider tapping is their directors and officers insurance, but that too may offer little cover.

However, EPLI policies typically exclude wage and hour claims (the most common PAGA claims), or they will impose significant limits on what they will pay out for such claims. Similarly, D&O policies for private companies also exclude wage and hour claims, and policies for publicly traded companies.

Additionally, most D&O and EPLI policies will not cover penalties, which is typically the way which PAGA awards are assessed. When employees sue under PAGA, they cannot seek lost wages or damages, rather they can only seek penalties.

Your broker may be able to try to negotiate supplements for wage an hour.

In the end, the best strategy is risk management-based, one that leans very heavily on accurate time sheets, allowing for breaks and appropriately paying for overtime.

Recordkeeping is the key versus trying to find an insurance product to cover poor risk management. ❖