

# PAGA Amendments

Have Recent Changes  
Improved the Plight  
of Employers?

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# Agenda

- Background on PAGA
- Curing Options
- Revised Penalties
- Standing Requirement
- How to Make the Most of the Amendments
- PAGA's Future



# Background on PAGA

# How We Got Here

**2003**

California bill creating PAGA is signed to assist the state in enforcing labor code

**2004**

Amendment to PAGA passed to allow for curing less serious labor law violations and puts in place certain administrative procedures prior to complaints being filed

**2015**

Urgency legislation signed to amend PAGA to allow curing for items like incorrect employer names on wage statements

**2016**

Budget bill passed that allows for online filing of notices and other statutory revisions

**2018**

Bill passed to exempt employees in the construction industry working under a collective bargaining agreement

# Challenges Faced by Employers

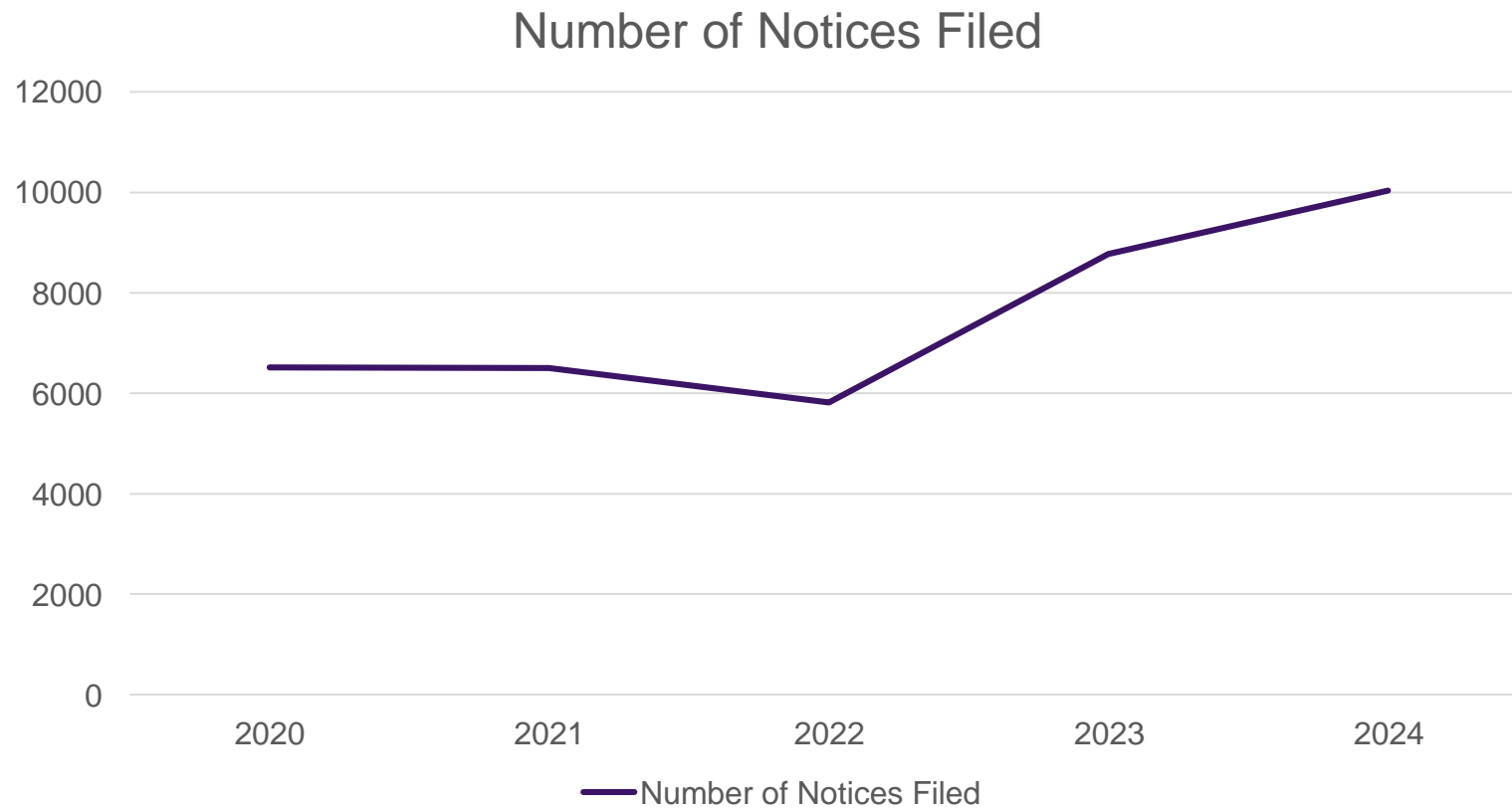
- **High litigation costs:** Allowed employees to file even for minor technical violations
- **Severe penalties:** Penalties could accumulate quickly
- **Complex compliance requirements:** Even small compliance issues could lead to significant penalties
- **Cases are difficult to defend:** Plaintiffs entitled to far-reaching discovery and do not need to certify
- **No arbitration:** Representative PAGA claims cannot be compelled to arbitration
- **No direct settlements:** PAGA claims cannot be settled or released without court approval







# Notices Filed 2020 to 2024



# A PAGA Case in Six Steps

1

Notice filed with LWDA

4

Potential early evaluation conference for large employers

2

Potential cure proposal for small employers

5

Mediation/settlement/court approval of settlement (Common)

3

Lawsuit filed (or amendment to existing complaint)

6

Discovery

# What About Going to Trial?

- Relatively few cases go to trial
- Manageability concerns — though these were somewhat changed due to amendments as we will discuss
- Cost of taking an action to trial
- Risk of producing harmful discovery
- Potential for significant penalties and attorneys' fees

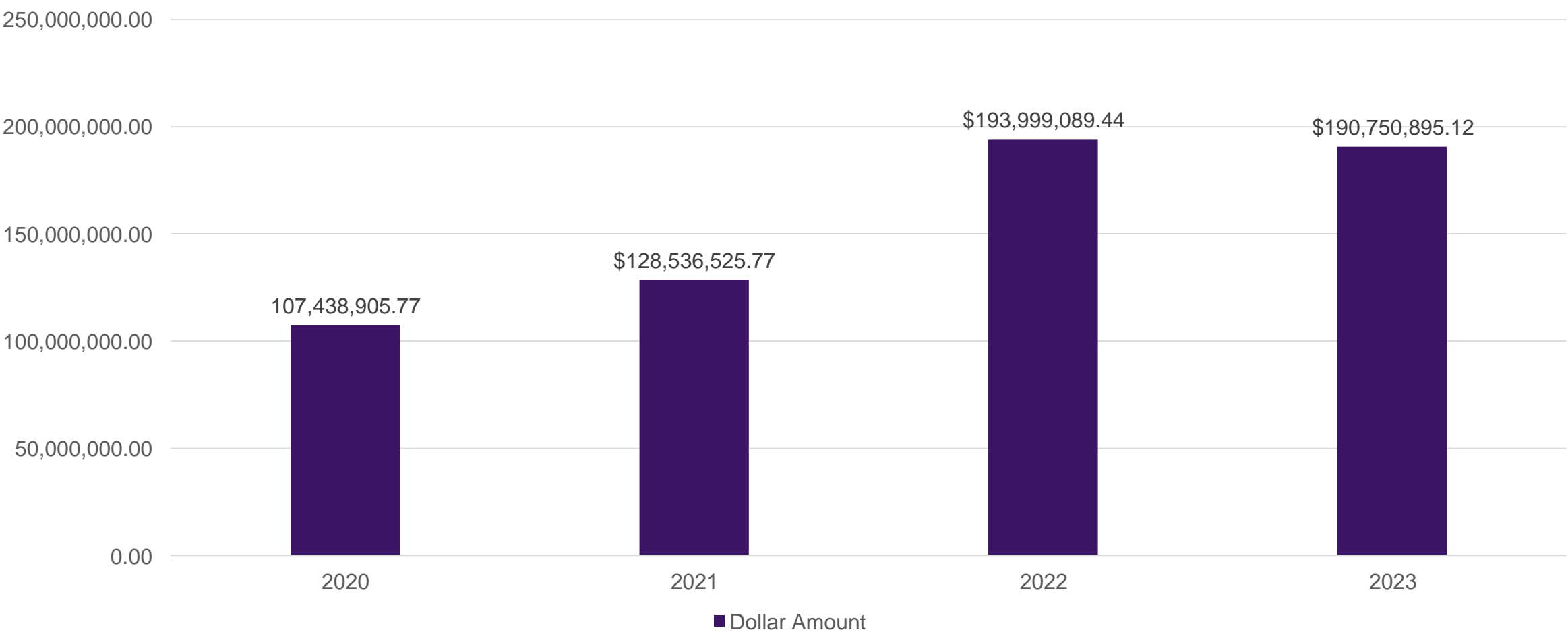




# The Numbers: Relevant Statistics about PAGA Cases (2016–2020)

- **23,675** PAGA notices filed
- **526** days is average to resolve
- Average settlement: **\$1,118,777**
- Average amount of attorney fees: **\$368,520**

# The Numbers: Penalties Collected by LWDA



# Fair Pay and Employer Accountability Act

## Ballot measure for November 2024

- Sought to eliminate PAGA and replace with state enforcement mechanism
  - Increased penalties: Double statutory and civil penalties for willful violations
  - Allocation of penalties: 100 percent of monetary penalties awarded to harmed employees (previously 25 percent)
  - Employer resources: Provide resources to ensure labor compliance
  - DLSE involvement: Require the Division of Labor Standards Enforcement (DLSE) to be a party to all labor complaints
  - No attorney's fees: Eliminate attorney's fees currently awarded under PAGA
  - Mandate to fully fund for DLSE to meet its requirements

# 2024 PAGA Amendments

## Senate Bill 92

- Effective immediately, with the exception of specific cure provisions which took effect on 10.01.2024
- Applies to civil actions filed on or after 06.19.2024
- Expands the right to cure Labor Code violations for businesses with fewer than 100 employees and offers businesses with more than 100 employees the ability to seek an early resolution of PAGA claims pending in court

## Assembly Bill 2288

- Effective immediately
- Applies to civil actions brought on or after 06.19.2024
- Focuses on revisions to penalties and potential penalty caps





# Curing Options

# Curing Defined

- Violation is corrected
- Employee is made “whole”

## **Unpaid Wages Cured**

- An amount sufficient to recover any owed unpaid wages due dating back three years from the date of the notice
- Seven percent interest
- Any liquidated damages required by statute
- Reasonable lodestar attorney's fees and costs

## **Violation of Labor Code Section 226(a)(8)**

### **Name of employer on wage statement**

- Upon showing the employer has provided at no cost to the employee a fully compliant, itemized wage statement
- May be provided in digital form or computer generated/maintained in the ordinary course of business

## **Violation of Labor Code Section 226(a)(1-9) Excluding Subsection (8) Cures**

### **Other wage statement requirements**

- Upon showing that the employer has provided at no cost, a fully compliant, itemized wage statement
- May be provided in digital form or be computer generated/maintained in the ordinary course of business



## Revised Penalties



# Employee Share of Penalties Increased

PAGA penalties will be distributed

- **65%** to the LWDA
- **35%** to the aggrieved employees



# Penalty Caps for Good Faith Compliance

- PAGA penalties are capped at 15 percent for employers who demonstrate that, prior to receiving a PAGA notice or a request for employment records from the PAGA plaintiff, the employer took “**all reasonable steps**” toward complying with the Labor Code provisions in the PAGA notice
- The cap increases to 30 percent if an employer demonstrates that, within 60 days of receiving a PAGA notice, it took all reasonable steps prospectively toward complying with the Labor Code provisions identified in the PAGA notice

# Mitigating Circumstances

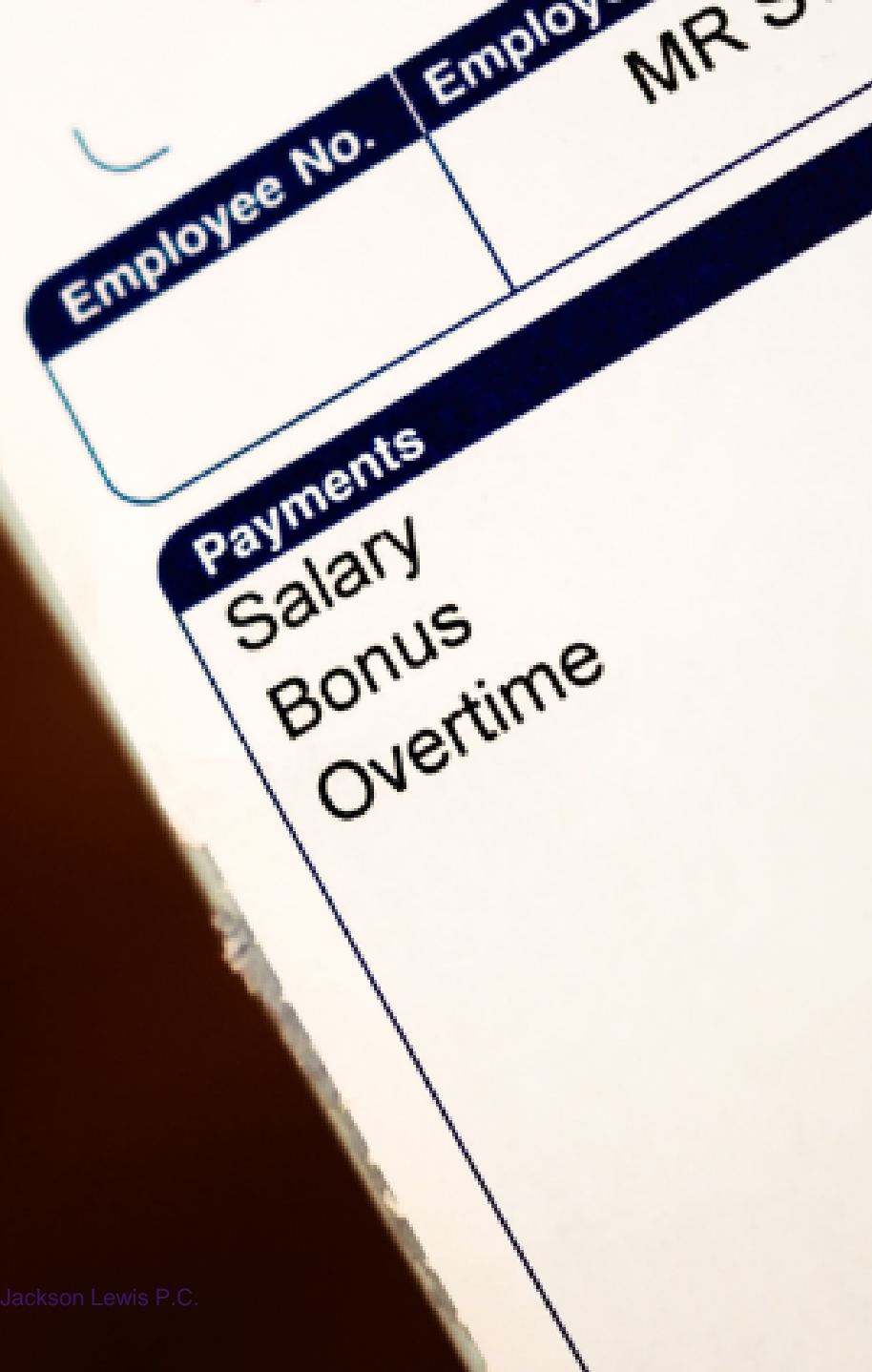
**15 percent** cap requires employer to show it took “**all reasonable steps**” to ensure compliance, which may include, but are not limited to, any of the following actions

- Periodic payroll audits
- Disseminating lawful written policies
- Training supervisors on applicable Labor Code and wage order compliance
- Taking appropriate corrective action with regard to supervisors

**30 percent** cap requires employer to show it took “**all reasonable steps**” to ensure compliance, which may include, but are not limited to, **taking an action to initiate** any of the following activities

- Conducting an audit of the alleged violations and take action in response to the results
- Disseminating lawful written policies as to the alleged violations
- Training supervisors on applicable Labor Code provisions and wage order compliance
- Taking appropriate corrective action with regard to supervisors





# Reduced Penalties for Wage Statement Violations

- PAGA penalties for wage statement violations are reduced from a general maximum \$100 to \$25 per aggrieved employee per pay period **if the employee could promptly and easily determine from the wage statement alone the information allegedly unlawfully missing from the wage statement**

# Reduced Penalties for Derivative Violations

- PAGA penalties for untimely payment of wages during employment and/or upon separation are **not recoverable if the claim is derivative** of an unpaid wage claim and the violation was neither willful nor intentional
- Similarly, PAGA penalties for inaccurate wage statements are not recoverable if the claim is derivative of an unpaid wage claim and the violation **was neither knowing nor intentional**

# Reduced Penalties for Cured Violations

- If an employer cures a violation through the early evaluation conference (discussed above), the PAGA penalty is capped at **\$15 per aggrieved employee per pay period**
- If an alleged violation is attributed to an employer who took all reasonable steps to comply with the Labor Code provision at issue or one relating to wage statements, the PAGA **penalty is reduced to \$0**

# Reduced Penalties for Isolated Violations

- If a violation occurred due to an isolated, nonrecurring event
  - Meaning it does not extend beyond the lesser of **30 consecutive days or four consecutive pay periods**
- The PAGA penalty is capped at \$50 per aggrieved employee per pay period

# Relief for Employers with Weekly Pay Periods

- Reduces any PAGA penalties recoverable against employers who have weekly pay periods by one-half
- Puts employers with weekly pay periods on equal footing as employers with biweekly pay periods





# Limits on Aggravated Penalties

PAGA's aggravated penalty of \$200 per aggrieved employee per pay period applies only where either of these situations apply

- a) Within five years preceding the alleged violation, a court or the LWDA issued a determination that the employer violated the Labor Code provision in dispute  
or
- b) The employer's conduct was malicious, fraudulent, or oppressive

# Injunctive Relief

- Plaintiffs may now pursue injunctive relief under PAGA







# Manageability

- Builds on *Estrada v. Royalty Carpet Mills*
- Grants courts discretion to limit the scope of PAGA claims and evidence presented at trial

# *Estrada v. Royalty Carpet Mills*

- **California Supreme Court**

Resolved a split of authority on the issue of whether trial courts have discretion to strike or narrow a Private Attorneys General Act (PAGA) claim based upon manageability grounds

- **Holding**

Trial courts lack inherent authority to strike PAGA claims on manageability grounds

- In reaching that conclusion, the Court emphasized that trial courts do not generally possess a broad inherent authority to dismiss claims and examined the statutory and procedural differences between class actions and PAGA claims



# Standing Requirement

# Revised Definition of “Aggrieved Employee”

- **Personally** suffered each of the violations
- Suffered the violations during the period prescribed by the statute of limitations
- Exceptions for individuals represented by a nonprofit legal aid organization who has acted as PAGA counsel for at least five years prior to 01.01.2025



# The Fiction of the Individual + Non-Individual PAGA Claim

- *Viking River Cruises Inc. v. Moriana*: U.S. Supreme Court Decision (2021)
  - The Court ruled the Federal Arbitration Act (FAA) preempts California law to the extent that it prohibits the division of a PAGA claim into individual and non-individual claims
  - The Court ruled individual claims could be compelled to arbitration, but non-individual claims could not
- **Prior to this ruling there had not been an understanding that there were two components to a PAGA claim and there was no ability to compel any aspect of a PAGA claim to arbitration**



# How to Make the Most of the Amendments

# Take “All Reasonable Steps” Regularly

- Periodic payroll audits
- Disseminate lawful written policies
- Train supervisors on applicable Labor Code provisions and wage order compliance
- Take appropriate corrective action regarding supervisors



# Steps to Perform Audit

## **1. Review current policies and procedures**

Ensure they align with current laws



## **2. Analyze payroll and timekeeping records**

Verify accuracy and compliance with wage and hour laws



## **3. Document findings and implement corrective actions**

Address any identified issues promptly



## **4. Train and re-train managers and supervisors**

Ensure supervisors are aware of company wage and hour policies and California law

# Arbitration Agreements?

- May allow employers to use standing limitations under amendments as a defense
  - Have to complete arbitration and knock out PAGA plaintiff first
  - Arbitration can be costly
- Court of Appeal split may mean more headless PAGA claims which negate usefulness of arbitration agreements with regards to PAGA

# The Individual Settlement v. the Representative Settlement

## Commonly asked questions

- Will the PAGA plaintiff agree to settle individually?
- How do I convince the PAGA plaintiff to accept an individual settlement?
- What can the plaintiff release through an individual settlement?
- How much will this cost to fight in arbitration?
- How much will this cost to fight in court?





# PAGA's Future

# Increased Involvement by LWDA?

- Investigations
- Interventions and challenges to settlements
- Holding serial filers accountable



# Trends in PAGA Cases

- Expense reimbursement claims
- Regular rate violations
- Cal/OSHA claims

# Questions?

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Thank you.

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