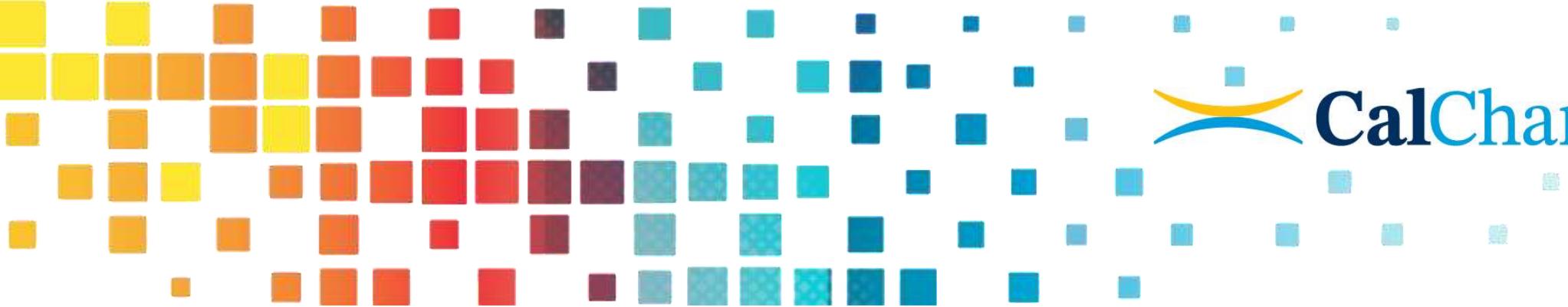


2024 PAGA Reforms

Good News, Bad News about PAGA



Speakers:



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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

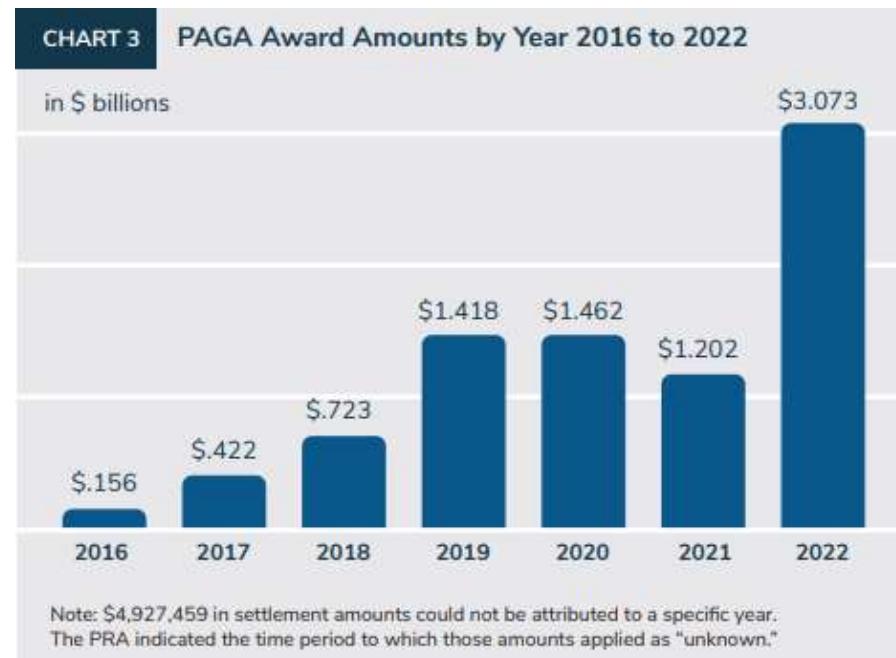
Private Attorneys General Act (PAGA)

- Significance of PAGA Claims/Laundry List of Problems:
 - 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



Rise in PAGA Litigation

Source: *Baker & Welsh, LLC, California's Private Attorneys General Act of 2004: An Assessment of Outcomes and Recommendations for a More Effective Alternative (February 2024)*



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 die or do 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

FixPAGA



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

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
- **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



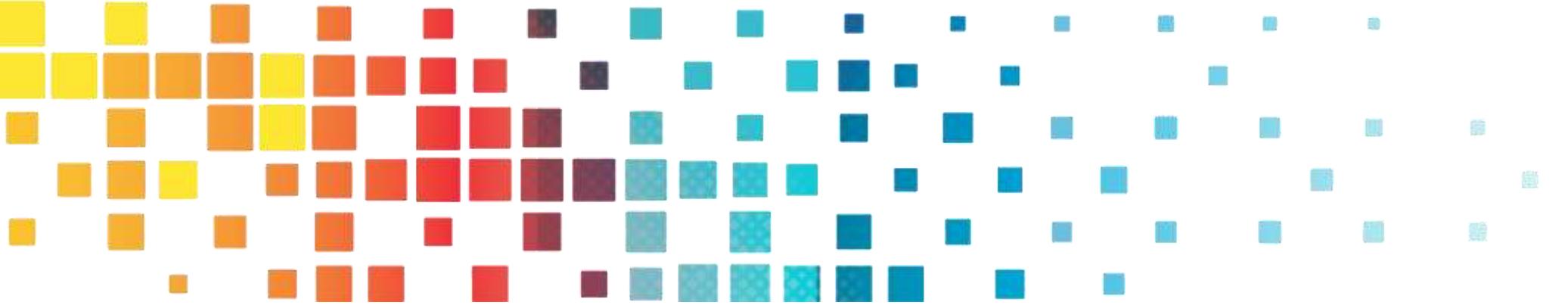
“All Reasonable Steps” – Training

- No longer just for supervisors and managers
- Typically the training would 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

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.

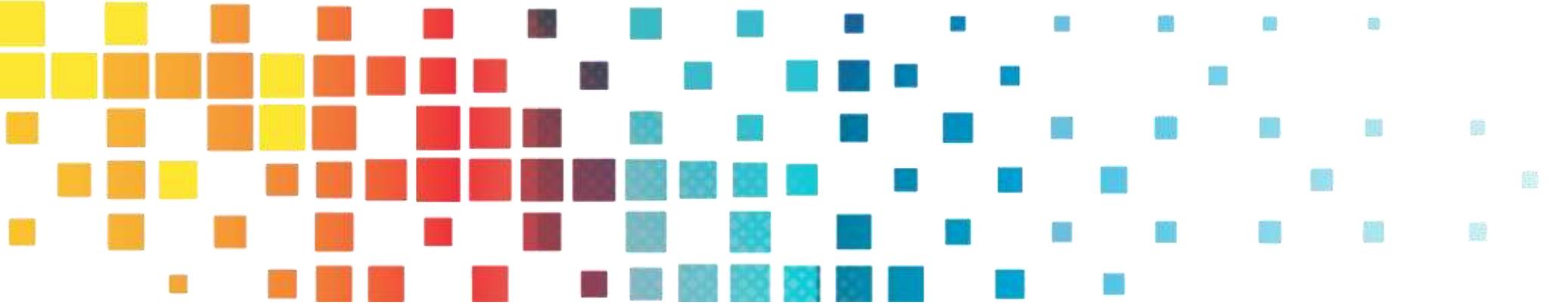
Litigation Relief – Manageability

- 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)



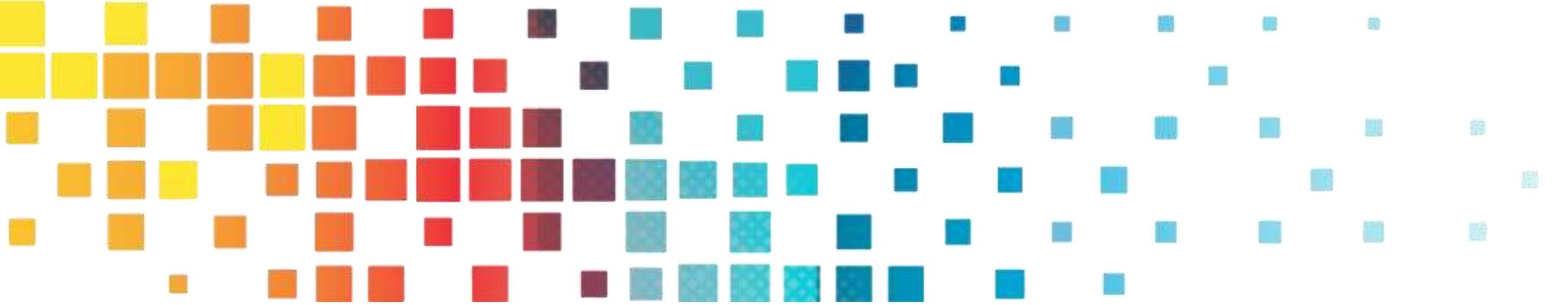
Enhanced Cure Process

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

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

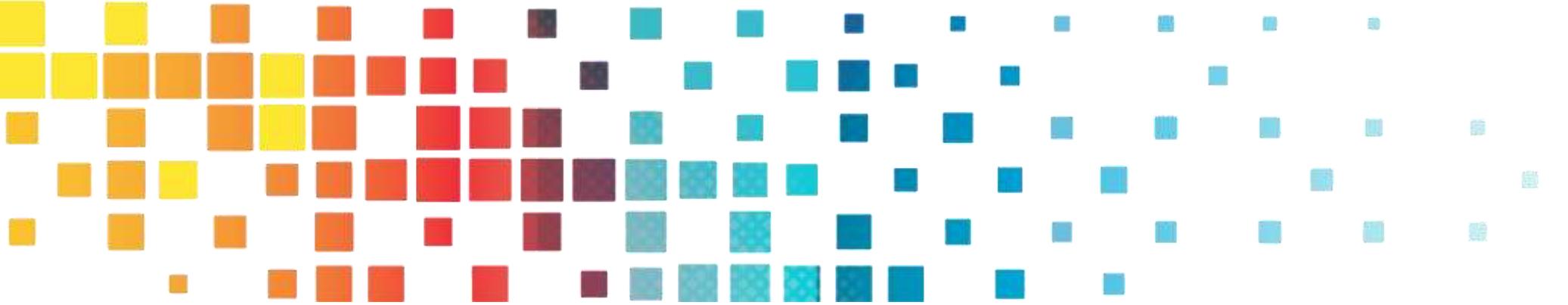


When Can Companies Take Advantage of PAGA Reform



It Depends!

- For PAGA actions filed in court, the new rules only apply to actions filed **on or after June 19, 2024**
- It also does not apply to cases where the LWDA letter, the prerequisite to a PAGA lawsuit, was submitted to the state before **June 19, 2024**
- Otherwise, companies can start taking advantage of penalty reductions based on “all reasonable steps” taken **right now, before a PAGA letter or lawsuit.**



Windfall for Employer? Not So Fast...





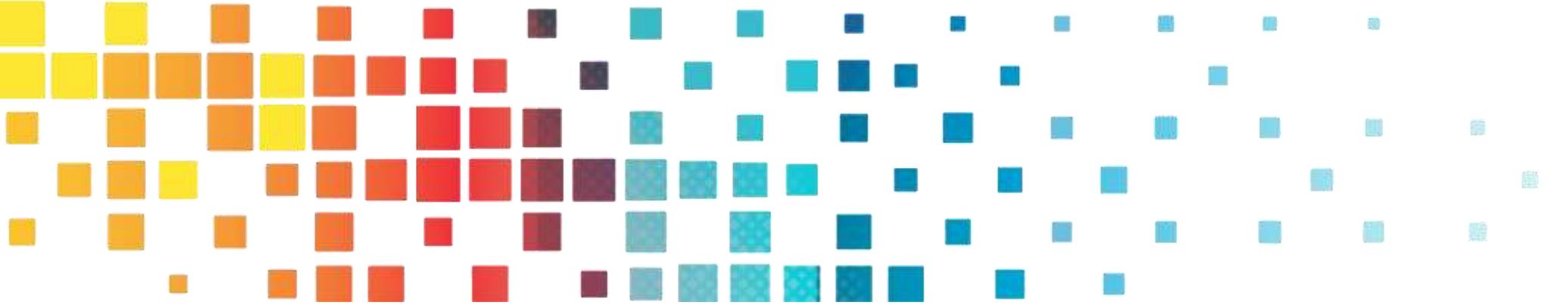
What Did the Other Side Get?

- **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 and Parting Thoughts



Trends and Parting Thoughts

- Seemingly little to no impact on PAGA filings
- Concrete impact on how PAGA cases are litigated, particularly with regards to early evaluation conferences and standing/manageability defenses
- Little data thus far, but some impact on settlement value
- “All Reasonable Steps” including policy review, audits, and follow up action provide clear guidance and opportunity



Questions



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