MINDFUL
INSURANCE SOLUTIONS INC.

RISK REPORT

APRIL 2022 | VOLUME 5 | ISSUE 2

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

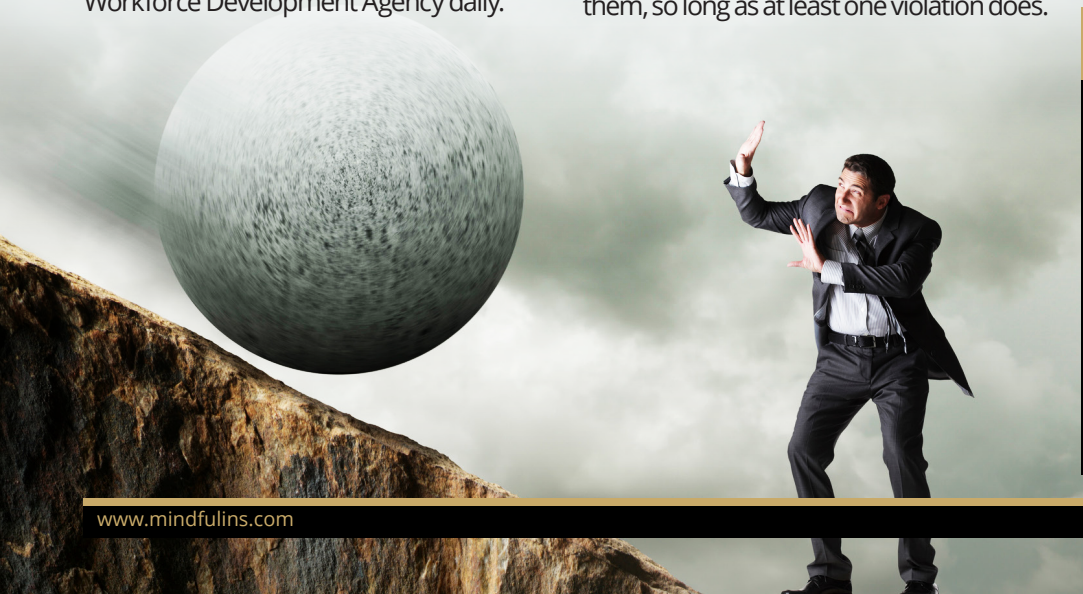
- Claims for unpaid off-the-clock work during meal periods,
- Claims for misclassifying employees as independent contractors, and
- Claims for rounding employee time entries.

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.

See 'EPLI' on page 2



CONTACT US

MINDFUL
INSURANCE SOLUTIONS INC.

2043 ANDERSON RD, SUITE C
DAVIS, CA 95616

Toll Free: 877-223-4437
Fax: (530) 419-4811

E-mail: info@mindfulins.com

License #0I67525

CalSavers Law

Registration Deadline Looms for Small Employers

THE DEADLINE is fast approaching for employers with five or more workers in California, and who do not already offer their employees a retirement plan, to register their staff for the CalSavers Retirement Savings Program.

Only California employers that do not offer retirement plans are required to register for CalSavers and there are different registration deadlines depending on employer size, staggered over a few years as follows:

Employers with 100 or more workers – The deadline for registration was June 30, 2020.

Employers with 50 or more workers – The deadline for registration was June 30, 2021.

Employers with five or more workers – The deadline for registration is June 30, 2022.

Employers can register anytime to start the program for their workers. Firms with fewer than five employees are exempt, but they too can sign their workers up for CalSavers.

Employers that don't provide a retirement plan for their workers, and who fail to register, can face a penalty of $250 per employee, as well as additional penalties for sustained noncompliance.

If you already have a qualified retirement plan for your employees, you do not have to participate.

Qualified retirement plans

- Qualified pension plans
- 401(k) plans
- 403(a) plans
- 403(b) plans
- Simplified Employee Pension (SEP) plans
- Savings Incentive Match Plan for Employees (SIMPLE) plans
- Payroll deduction IRAs with automatic enrollment.

How CalSavers works

Participating employers will deduct a default rate of 5% of pay from the paycheck of each employee at least 18 years old and deposit it into the individual's CalSavers account. Employees can choose other rates as well.

Employee participation is voluntary, and they can opt out at any time. Regardless of whether any employees want to sign up for a plan, applicable employers are required to register and offer the program to all current employees and new hires.

The deduction amount will automatically escalate one percentage point each year to a maximum of 8%, unless the individual employee elects a different amount, elects out of auto-escalation or completely opts out of the program.

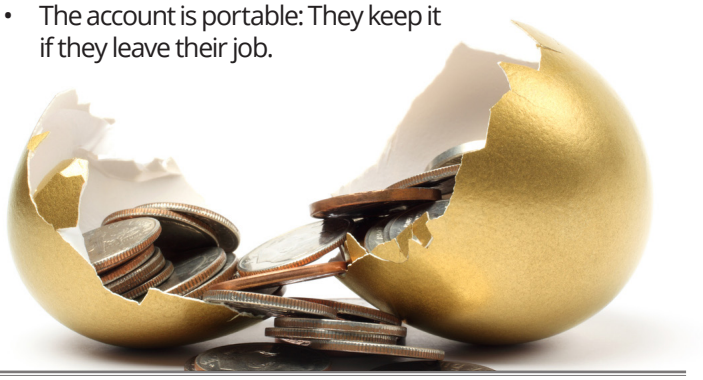
Business owners who are employees of their business can also participate. Business owners who are not employees may enroll as an individual and make automatic contributions every month. There are no costs for businesses to sign up and facilitate the program for their employees.

Employers can register here. Once set up and employees have signed up, the employer will be responsible for taking off the chosen deduction for each employee and transferring it to CalSavers at each pay period.

For employees

A CalSavers account is a personal Roth Individual Retirement Account (Roth IRA) overseen by the CalSavers Retirement Savings Investment Board. Here's some information employees need to know:

- A portion of their pay is automatically deducted after taxes are taken out and transferred to an IRA that belongs to them.
- Employees can customize their account by setting their own contribution rate (between 1% and 8%), as well as choose the investments they want to put their money in.
- The account is portable: They keep it if they leave their job.



Continued from page 1

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.

Risk Management

Don't Let a Subcontractor Derail Your Safety Efforts

ONE OF the biggest challenges construction businesses 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 subcontractor 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 subcontractor 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 subcontractors 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 subcontractor 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 subcontractors 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.

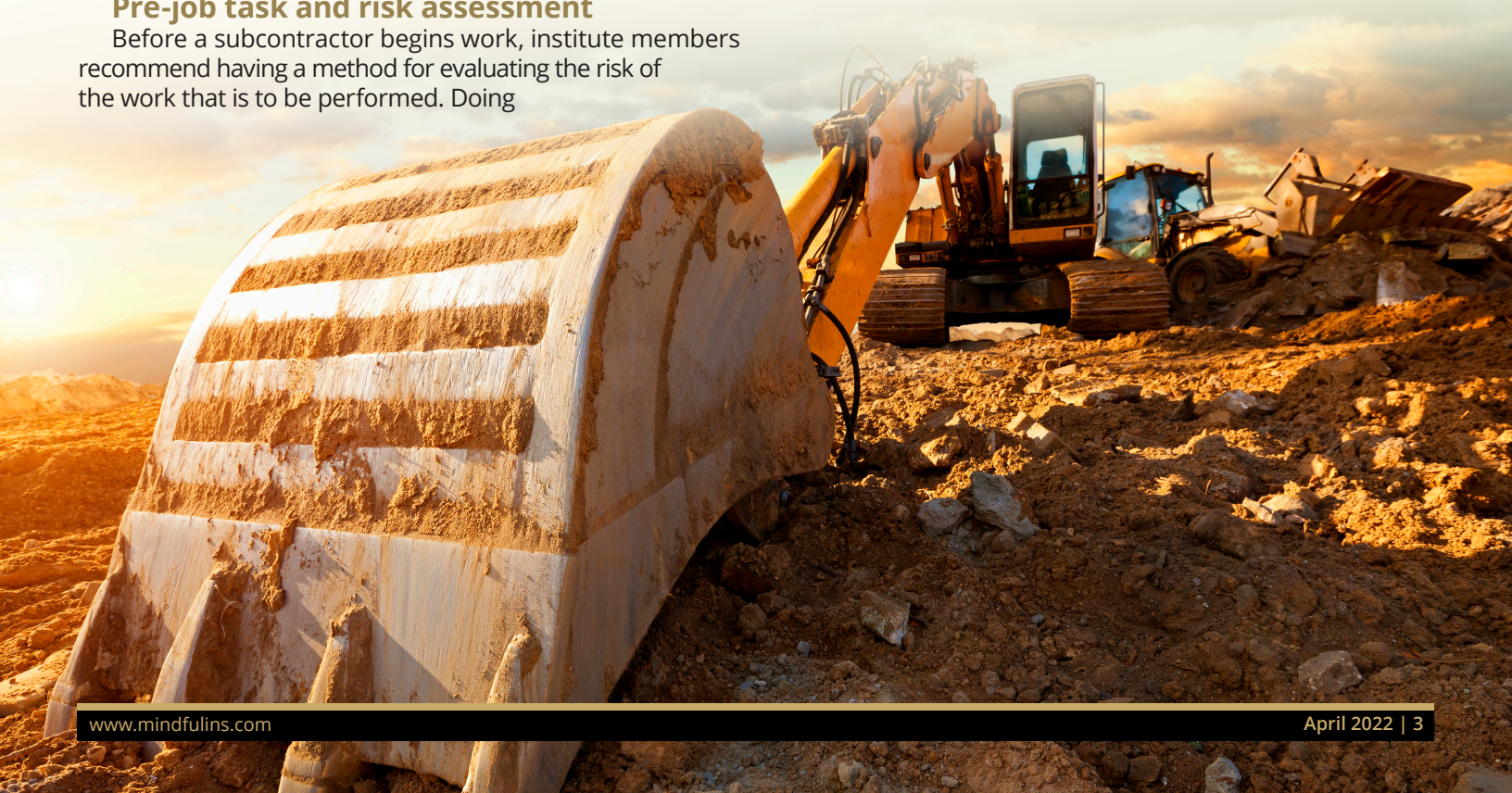
Job monitoring

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 subcontractor 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 subcontractor's eligibility for future contracts.



Growing Threat

Funds Transfer Fraud Hits Small Firms the Hardest

WHILE RANSOMWARE is making the headlines as the major cyber threat, small and mid-sized businesses are increasingly being targeted by lower fraud that dupes them into wiring criminals funds, according to a new report.

These funds transfer fraud crimes involve hackers gaining access to a firm's mailbox and extracting payments that go into their accounts.

Companies should have in place proper systems safeguards to combat these attacks, and that includes regularly training staff on how to identify these attempts to steal funds.

By The Numbers

69%	Average jump in losses from funds transfer fraud from 2020 to 2021
105%	Average jump in small firms' losses from funds transfer fraud from 2020 to 2021
$309,000	Average initial losses from funds transfer fraud for small firms in 2021

Source: Coalition's "2022 Cyber Claims Report"

How it works

Criminals will often try to penetrate your servers by sending "spearphishing" e-mails. These messages look like they're from a trusted sender to trick victims into revealing confidential information.

They may also send malicious e-mails in the hope that an employee clicks on a bogus link. The link then releases malicious software that infiltrates company networks and gains access to legitimate e-mail threads about billing and invoices.

Once the criminals have access to your business mailbox, they can manipulate your contacts and modify payment instructions. They may also use their access to your systems to send e-mails that appear to come from a known source making a legitimate request.

Protecting your enterprise

- Don't click on anything in an unsolicited e-mail or text message asking you to update or verify account information. Look up the company's phone number on your own (don't use the one a potential scammer is providing), and call them to ask if the request is legitimate.
- Carefully examine the e-mail address, URL and spelling used in any correspondence. Scammers use slight differences to trick your employees and gain your trust.
- Be careful what you download. Instruct your staff to never open an e-mail attachment from someone they don't know, and to be wary of e-mail attachments forwarded to them.
- Set up two-factor (or multi-factor) authentication on your accounts.
- Verify payment and purchase requests in person if possible, or by calling the person to make sure it is legitimate. You should verify any change in account number or payment procedures with the person making the request.
- Be especially wary if the requestor is pressing you to act quickly.

Source: Federal Bureau of Investigation

Insurance options

The best option for coverage is a commercial crime insurance policy.

Most of these policies cover acts like:

- Employee dishonesty
- Computer and funds transfer fraud
- Forgery or alteration
- Money and securities theft
- Theft of client's property.

Some policies may exclude funds transfer fraud, or they may have lower sublimits for such acts. In such cases you may need to get a policy extension to cover the risk.

There is also cyber liability insurance, which covers direct losses resulting from cyber crime. But these policies will often exclude coverage for social engineering attacks, which are the kinds that the criminals behind funds transfer fraud use.

You may be able to purchase a rider to your cyber liability policy that would cover these crimes.