

BY KARL GERBER

The amendments to the California Labor Code, via Sections 2699.3 and 2699.5, create a notice trap for the unwary, and costly waiting periods. These new sections were enacted in response to California Labor Code Section 2699 which was enacted soon before its amendment. Section 2699 enables plaintiffs to file non-class action lawsuits on behalf of similarly aggrieved employees, against employers violating the Labor Code. It also gives employees penalties for any violation of the Labor Code not specifically allowing the employee penalties, California Labor Code Section 2699(a), (e), (f).

Labor Code Sections 2699.3 and 2699.5 make filing virtually any non-worker's compensation claim under the Labor Code 2699, seeking 2699 penalties or proceeding on behalf of similarly situated employees, onerous. These sections create the most complex exhaustion of administrative remedy scheme in employment law,

and the longest wait times before a lawsuit can be filed. In other words, employees bringing lawsuits on behalf of similarly situated employees, or seeking penalties under 2699(a) or (f) because the Labor Code that was violated does not provide direct compensation to the employee, must go through the new exhaustion scheme. These new exhaustion requirements applicable to violations under each of the Labor Code sections listed in Labor Code Section 2699.5 which include most Labor Code sections through 3095, and then 6300 and higher, California Labor Code Section 2699.3(a).

In order to comply with these new exhaustion requirements, an initial written notice must be given by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of the Labor Code being violated, Labor Code Section 2699.3(a)(1). The Labor Commission presently has two forms

available for this purpose. One is primarily geared towards violations of wage and hour laws, and the other at discriminatory theories and violations of California Labor Code Section 1102.5. In a complex case, or a potential class action, a wise practitioner should include an attachment further specifying the numbers of people involved, and their potential damages.

Once the initial certified letter goes out from the employee, the Workforce Division has 30 days from the postmarked date of the notice to advise whether it will investigate, California Labor Code Section 2699.3(a)(2)(A). If there is no notice within 33 days of the postmarked notice of the employee's certified mail of the Workforce Division's intent to investigate, the employee may commence a civil lawsuit.

If the Workforce Division intends to investigate the alleged violation, and it notifies the employee or repre-

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 sentative by certified mail of this decision within 33 days of the postmarked date of the employee sending their notice, the agency has 120 days to investigate, California Labor Code Section 2699.3(a)(2)(B). If the agency is unable to reach a resolution, or issue a citation within 120 days of its notification of intent to investigate, it loses jurisdiction and a lawsuit may be filed. The agency also loses jurisdiction if it fails to comply with these complex statutory notice requirements including having to notify the employer within 5 days business days, by certified mail, of its decision to issue a citation, Id.

Anticipating that the lengthy exhaustion period could stall the filing of a lawsuit in 2699 remedies were only part of the lawsuit, Section 2699.3(a)(2)(C) allows a plaintiff a right to amend an existing complaint to add a cause of action arising under 2699 within 60 days of "the time periods specified in this part," Id. What the time periods specified in this part means is a bit vague given all of the time periods specified in 2699.3.

Section 2699.3(b) specifies a different exhaustion scheme if there is a violation of Labor Code sections commencing with 6300 (otherwise referred to as health and safety Labor Code Sections) filed to obtain the benefits of Labor Code Sections 2699(a) and (f) allowing penalties where not otherwise specified or allowed and permitting similarly situated plaintiffs to be added to the case. Under this scheme, the employee or representative must give notice by certified mail to the Division of Occupational Safety and Health, Section 2699.3(b). If the Division issues a citation, the employee may not commence an action pursuant to 2699, Id.

In circumstances involving violations commencing with Section 6300, it is not clear how long the employee has to wait to find out if the Division is going to investigate, or issue a citation. Section 2699.3(b)(2)(ii) specifies that "[i]f by the end of the period for inspection or investigation provided for in Section 6317, the division fails to issue a citation and the aggrieved employee disputes that decision the employee may challenge that decision in the superior court. Labor Code Section 6317 merely states that the

Division shall issue citations with "reasonable promptness."

No time is specified as to how long the Division has to investigate, or what reasonable promptness means. However, Section 6317(2) states citations cannot be issued for violations that occurred more than 6 months before the issuance of the citation. Does this mean the Division has 6 months to investigate? Although Section 2699(b)(2)(A)(ii) mentions Section 6317, Section 2699(b)(2)(A)(iv)(B) mentions Section 6309. That provision states that if the Division receives a complaint from an employee or representative of an employee, the

Division must investigate the complaint within 3 working days of the complaint if a serious violation is alleged, and 14 calendar days after receipt of the complaint of non-serious violations. Arguably, these are the waiting periods after notifying the Division of violations commencing with Section 6300.

Additional hurdles to utilizing 2699 for violations commencing with 6300 are found in Labor Code Section 2699.3c. The employer may cure the violations within 33 days of the post mark of the notice sent by the employee, California Labor Code Section

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2699.3c(2)(A). The employee can only file suit if at the end of the 33 day period he sends a second certified letter to the agency and employer specifying why the employee does not believe there was a cure. The agency may grant the employer another 3 days to cure. Only if the agency determines there has not been a cure, fails to provide timely notice or any notice, or the employee believes there has not been a cure after all of these time frames may the employee file a lawsuit. Sections 2699.3c(2)(A) and 2699.3c(3) essentially give the employer 50-52 days to cure and prevent the filing of a lawsuit for that amount of time. This time frame is at odds with the time frames provided in Section 2699(b).

Adding further confusion to how long an employee has to wait when utilizing 2699 due to violations of 6300 and higher, Labor Code Section 2699c(2)(B) states no employer can avail himself or herself to the cure provision more than three times in a 12 month period for the same violation contained in the notice. Thus, if the employer has cured the same violations 3 times in the last 12 months, the cure provisions in Section 2699(c) do not apply. In order to find this out, the employee will probably have to obtain records from the Division, and that will take time. If the Division is in the process of citing the employer for a violation, that information will not yet be available.

The legislature should eliminate these exhaustion requirements. The Labor Commission was allotted minimal funds to investigate all of these new claims that have to be exhausted. Their limited resources are further drained sending out storms of certified letters stating they received a complaint, or will not be investigating. It is unlikely that the Workforce Division can cause a resolution, if a hearing is required, within 120 or 158 days. Nor is it likely they will be able to resolve 2699 claims alleging violations of numerous pay periods, or actions on behalf of large numbers of similarly situated employees. Cases will only partially make their way through the Workforce Division in 120-158 days which will waste precious resources.

Commonly, employment cases will start out as discrimination or wrongful termination cases that months later are amended to allege 2699 remedies. The latent amendments may require latent reassignments to a classification of complex litigation. Courts will be burdened with motions to extend cut-off dates and trial dates issued prior to behemoth amendment by right 2699 claims alleging damages, claims, and aggrieved numbers of employees far greater than what was alleged before the amendment by right.

Legitimately aggrieved employees are harmed by having to wait months to get their cases going in court. Employers are harmed by having to defend these cases partially at the Labor Commission, partially in court, and having to list these claims in their accountings for long periods of time while they meander through the system.

Finally, sections 2699.3 and 2695 were not well drafted. Confusion exists as to the waiting time before health and safety violation lawsuits can be filed. There are also far too many sub-sections, relations to other statutes, and needs to check and calendar post marked dates. At the very least, these amendments should be better written.▲

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