

Employment Claims Under the Private Attorneys General Act: Standing, Representative Actions, Penalties

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The Private Attorneys General Act: “PAGA”

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PAGA Basics

What is PAGA?

Why PAGA matters

Why do Plaintiffs bring PAGA claims?

Who can sue under PAGA

Who can be sued under PAGA

Exhaustion Issues

What Is PAGA?

California Private Attorneys General Act of 2004

- Labor Code § 2699, et seq.
- “Essentially a qui tam action filed on behalf of the state to assist with labor law enforcement.” *Williams v. Sup. Ct.*, 3 Cal. 5th 531, 538 (2017).
 - But see *Magadia v. Wal-Mart Associates, Inc.*, 2021 WL 2176584, at *8 (9th Cir., May 28, 2021, No. 19-16184) (PAGA's features diverge from assignment theory of *qui tam* injury, and depart from the traditional criteria of *qui tam* statutes)
- After exhaustion, PAGA authorizes an “aggrieved employee” to file a representative action on behalf of him/herself and other aggrieved employees.

What Is PAGA?

PAGA claims are representative actions

- A PAGA claim is not a class action
- Aggrieved employee need not have suffered every violation alleged
- PAGA claims seek recovery of “civil penalties”
 - 75% to State and 25% to “aggrieved employees”

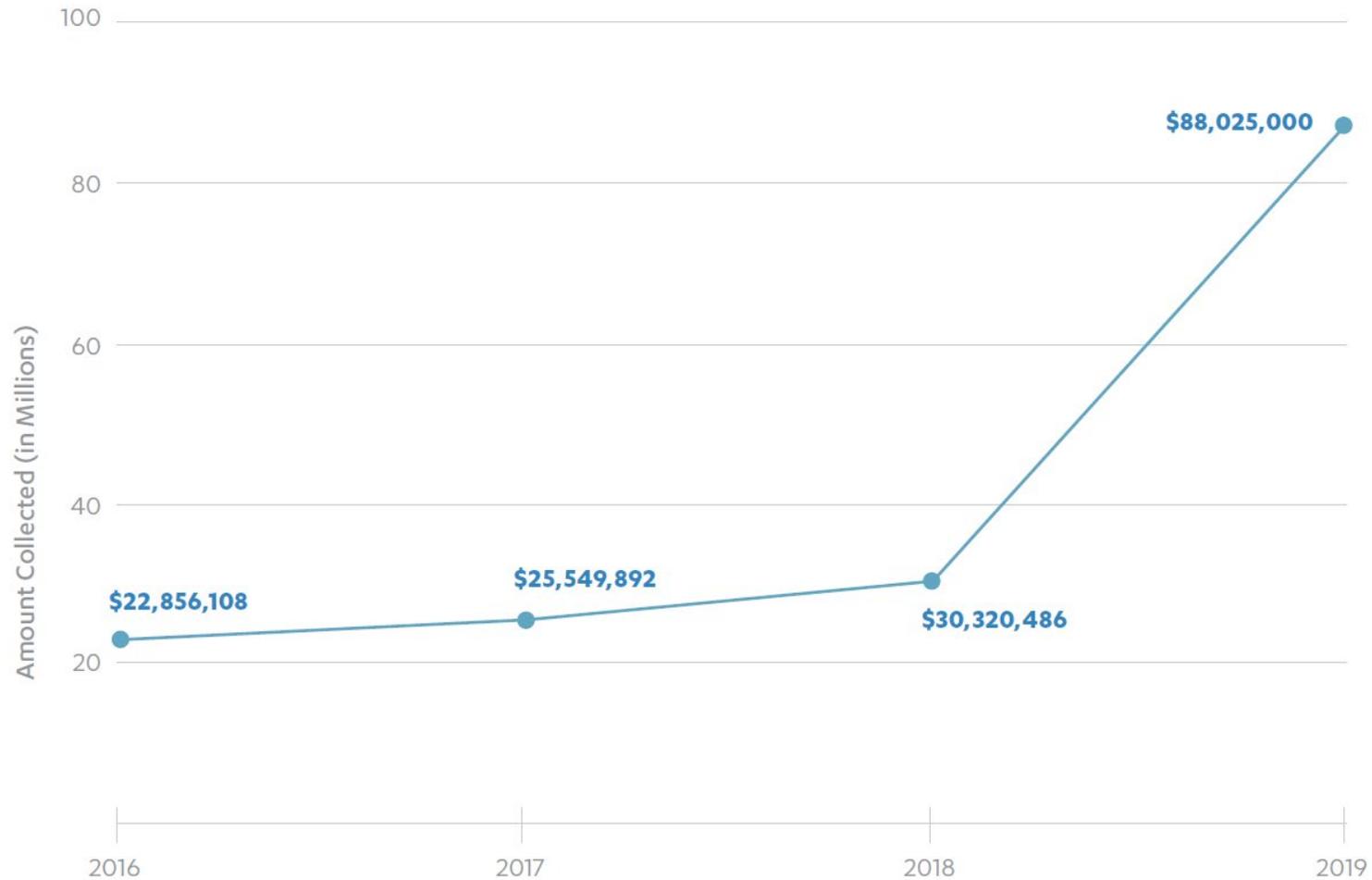
Why PAGA Matters

Recent PAGA settlements and awards

- *Garrett v. Bank of America* (Alameda Superior)
 - Judge Smith approves \$15 million PAGA only settlement (suitable seating)
- *Brown v. Wal-Mart Stores, Inc.*, Case No. 5:09-cv-03339-EJD (N.D. Cal.)
 - Judge Davila approves \$65 million PAGA only settlement (suitable seating)
- *Bernstein v. Virgin America, Inc.*, Case No. 15-cv-02277-JST (N.D. Cal.)
 - Judge Tigar awards \$25 million in PAGA penalties
- *Magadia v. Wal-Mart Assocs., Inc.*, Case No. 17-cv-00062-LHK (N.D. Cal.)
 - Judge Koh awards \$53 million in PAGA penalties

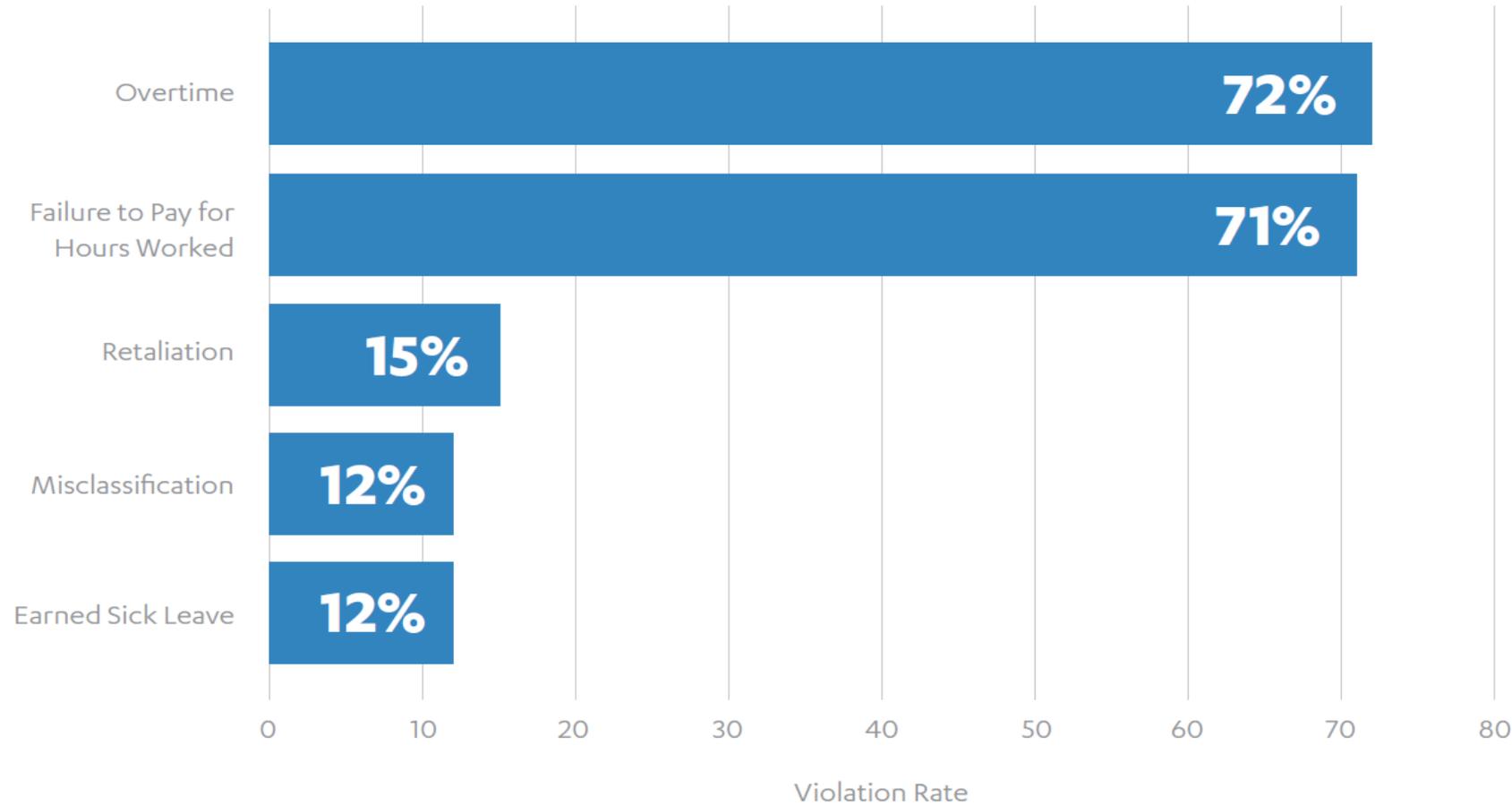
Why PAGA Matters

Figure 2: PAGA Penalties Collected, 2016-2019³⁹



Why PAGA Matters

Figure 3: Types of Violations Alleged in PAGA Notices, Sept. 2016-Jan. 2020



Why do Plaintiffs Bring PAGA Claims?

- It is an additional remedy available to employees for wage and hour violations
- When arbitration agreement(s) prevent class and collective claims
- Where meeting class certification requirements may be challenging
- Where proving damages for the alleged underlying Labor Code violations may be challenging
- PAGA provides for attorneys' fees
- PAGA may be the only recourse (e.g., suitable seating cases)

Not Available Under PAGA

- Individualized damages
- Injunctive relief
- Statutory penalties
- State agency violations (failure to act by LWDA)
- Workers compensation
- Employer notice or posting requirements

Who Can Sue under PAGA?

Kim v. Reins International California, Inc., 9 Cal.5th 73 (2020)

- “Employees who were subjected to *at least one* unlawful practice have standing to serve as PAGA representatives *even if they did not personally experience each and every alleged violation.*”

Who Can Sue under PAGA?

Magadia v. Wal-Mart Associates, Inc., 2021 WL 2176584 (9th Cir., May 28, 2021, No. 19-16184)

- Plaintiff lacked Article III standing to bring a PAGA claim for Walmart's meal-break violations since he himself did not suffer injury.
- Plaintiff's meal-break claim remanded to state court.

Who Can Be Sued under PAGA?

Individual Liability under PAGA

- Labor Code sections 558, 558.1, 1197.1
 - 558 and 558.1:
 - “Any employer or other person acting on behalf of an employer”
 - 1197.1:
 - “Any employer or other person acting either individually or as an officer, agent, or employee of another person”
- *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809
 - Upholding civil penalties against individual defendant under Labor Code sections 558 and 1197.1

Who Can Be Sued under PAGA?

Public Entity Liability under PAGA

- *Sargent v. Board of Trustees of California State University*, 61 Cal.App.5th 658 (2021)
 - Public entities may be liable under PAGA for violating Labor Code provisions that themselves provide for penalties

Pre-filing Exhaustion Requirements

2016 Amendments to Lab. Code § 2699.3 (SB 836)

- Notice must be provided online to LWDA, <http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>; pay \$75
- If LWDA does not act within 60 days (with notice) or 65 days (without), employee may sue
- File stamped copy of complaint must be provided to LWDA
- If LWDA investigates, it has 120 days from date of decision (+ 60 day extension)
- Amendments also require notification of settlement, judgment or order on penalties (see below)

Pre-filing Exhaustion Requirements

Notice must provide sufficient detail – How much is enough?

- Notice must identify the specific Labor Code violations alleged and the facts and theories supporting the claim
 - *Alcantar v. Hobart Serv.*, 800 F.3d 1047 (9th Cir. 2015)
 - Notice insufficient: “string of legal conclusions with no factual allegations or theories to support them.”
 - *Gunn v. Family Dollar Stores*, 2016 WL 7030363 (S.D. Cal. 2016)
 - Notice insufficient because it “parrots statutory language without providing any factual details . . . or a theory of liability.”

Pre-filing Exhaustion Requirements

- *Conde v. Open Door Marketing*, 223 F. Supp. 3d 949 (N.D. Cal. 2017)
 - Notice sufficient: identified 1) job held by plaintiff; 2) period of time worked; 3) legal theory underpinning claims (misclassification).
- *Green v. Bank of America*, 634 Fed. Appx. 188 (9th Cir. 2015)
 - Notice sufficient: identified 1) name of specific statute violated; 2) facts about positions plaintiffs held; 3) statement plaintiffs could use a seat; 4) specific identification of who was harmed.
- *Khan v. Dunn-Edwards Corp.*, B270382 (January 4, 2018)
 - Notice insufficient: Written notice to the LWDA referred only to plaintiff and not to his coworkers.

Failure to Exhaust

- *Brown v. Ralphs Grocery*, 28 Cal.App.5th 824 (2018)
 - Plaintiff filed Second Amended Complaint adding new claims under PAGA that were not alleged in her PAGA exhaustion letter
 - Plaintiff failed to adequately allege the new violations
 - Equitable tolling is not available
 - Relation back may be available
 - Plaintiff need not allege violations under § 558 as long as she gave notice of the underlying violations that give rise to penalties under § 558

Failure to Exhaust

- *Esparza v. Safeway*, 36 Cal.App.5th 42 (2019)
 - Plaintiff narrowed PAGA claims to violations that occurred prior to June 17, 2007
 - Plaintiff had sent his LWDA letter in July 2008
 - Holdings:
 - PAGA claims does not relate back to the filing of the underlying complaint
 - Plaintiff had failed to exhaust under PAGA , and his PAGA claim was properly dismissed

Litigating PAGA Claims



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General Categories of PAGA Claims

- Typical Wage and Hour Violations
 - See Lab. Code § 2699.5
- Health and Safety Code Violations
 - Lab. Code §§ 6300 – 9104 (except §§ 6310, 6311, and 6399.7)
- Curable Violations
 - Lab. Code § 226(a)(6) (pay period dates), § 226(a)(8) (employer's name and address), and §§ 226(b)-(c), 432, and 1198.5 (failure to respond to records request)
 - Curable, but potentially not actionable: Lab. Code §§ 245 *et seq.* (paid sick leave) and 2810.5 (WTPA notices)

“Litigation” Begins Upon Receipt of a PAGA Notice

- Identify Scope of Claims and Potential Limitations
 - Applicable Dates: Postmark Date, Online Submission, and Delivery/Receipt
 - Claimant: Job Title(s) and Work Location(s)
 - Allegedly Aggrieved Employees
 - Specified Labor Code Provisions
 - Facts and Theories

PAGA Claims Alleging Health and Safety Code Violations

- Claims based on allegedly unsafe workplaces
- Unique PAGA Notice Requirements & Procedure
 - Notice to Division of Safety and Health (“DOSH”) through the same LWDA website
 - DOSH “shall inspect or investigate” the alleged violation(s)
 - If DOSH does not issue a citation within the required six-month timeframe, employee may “challenge that decision in the superior court”



Curing and Responding to Notice of Curable Violations

- Curable Violations Most Frequently Alleged
 - § 226(a)(6) (pay period dates)
 - § 226(a)(8) (employer’s name and address)
 - §§ 226(b)-(c), 432, and 1198.5 (failure to respond to records request)
- Curable, but potentially not actionable
 - § 245 *et seq.* (paid sick leave)
 - § 2810.5 (WTPA notices – “Notice to Employee”)
- Responding to a PAGA Notice with No Curable Violation?

Curing and Responding to Notice of Curable Violations

- Cure and provide notice within 33 calendar days from the postmark date of the notice.
- Cure notice by certified mail to the claimant/counsel and by online filing with the LWDA
 - Specifying the cured violation and actions taken.
- If employer cures “no civil action pursuant to Section 2699 may commence.”
- Employee must dispute the cure, which the LWDA “shall review ... and provide written notice of its decision.”

Other Considerations at the Outset of PAGA Litigation

- Arbitration Agreements
- Hybrid Class/PAGA Actions
- Prior Class and/or PAGA Settlements
- Venue for PAGA Claims
- Evaluating Potential Civil Penalty Exposure

Effect of Arbitration Agreements - *Iskanian*

- *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014).
 - **No PAGA representative action waivers.**
 - California Supreme Court compared PAGA actions to *qui tam* actions.
 - “[A] PAGA claim lies outside the FAA’s coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship.”
- *Iskanian*’s holding has been repeatedly challenged (**unsuccessfully**):
 - *Iskanian* (SCOTUS cert. denied 2015).
 - *Bloomingtondale’s, Inc. v. Vitolo* (SCOTUS cert. denied 2017).
 - *Five Star Senior Living Inc. v. Mandviwala* (SCOTUS cert. denied 2018).
 - *Rivas v. Coverall North America, Inc.* (9th Cir. Denied rehearing 2021).
- Currently, one challenge pending before the U.S. Supreme Court:
 - *Viking River Cruises, Inc. v. Moriana* (SCOTUS cert. petition filed May 10, 2021).
 - Principal argument is that *Iskanian* is inconsistent with *Concepcion* and *Epic Systems*.

PAGA Claims Cannot be Compelled to Arbitration (ever!)

- Following *Iskanian*, it was somewhat of an open question as to whether PAGA claims could be arbitrated...ever...even if on a representative basis.
- That question has since been answered, repeatedly:
 - *Tanguilig v. Bloomingdale's, Inc.*, 5 Cal. App. 5th 665 (2016).
 - *Betancourt v. Prudential Overall Supply*, 9 Cal. App. 5th 439 (2017).
 - *Collie v. The Icee Co.*, 52 Cal. App. 5th 477 (2020).
 - *Bautista v. Fantasy Activewear, Inc.*, 52 Cal. App. 5th 650 (2020).
 - *Contreras v. Superior Court*, 61 Cal. App. 5th 461 (2021).

PAGA Only vs. Hybrid PAGA/Class Action Lawsuits

- In the wake of *Iskanian*, plaintiffs more frequently pursue PAGA-only lawsuits, with various procedural consequences.
 - *Why?*
 - Often, the reason is an arbitration agreement w/ class action waiver.
 - Sometimes, there are concerns about ability to certify a class.
 - *Some* evidence suggests that the consequence is lower recovery for the alleged “aggrieved employees.”
- Unlike hybrid class/PAGA actions, PAGA-only actions generally cannot be removed to federal court. See [*Urbino v. Orkin Services of California, Inc.*](#), 726 F.3d 1118 (9th Cir. 2013).
- In hybrid actions, there is an open question about whether the PAGA claims should be stayed pending arbitration of the underlying Labor Code claims.
 - Typically, that is what happens.
 - But, more on that later...

Effect of Prior Settlements

- Villacres v. ABM Industries Inc., 189 Cal. App. 4th 562 (2010).
 - Class member who had participated in settlement (without objecting or opting out) could not subsequently pursue PAGA only action for derivative Labor Code violations.
 - *Unclear whether this remains good law...*
- Kim v. Reins International California, Inc., 9 Cal. 5th 73 (2020).
 - Dismissal/settlement of underlying Labor Code claims did not deprive plaintiff of standing to pursue PAGA claims based on same Labor Code violations.
- Post-*Reins* Decisions:
 - Magana v. Zara USA, Inc., ___ Fed. Appx. ___, 2021 WL 1233379 (9th Cir. March 2021) (unpublished).
 - 9th Circuit limits effect of release in prior class/PAGA settlement to cover PAGA claims based on facts of earlier lawsuit.
 - Robinson v. Southern Counties Oil Co., 53 Cal. App. 5th 476 (2020).
 - Doctrine of claim preclusion bars relitigation of PAGA claim for penalties based on the same Labor Code violations resolved in earlier PAGA settlement.

Statute of Limitations for PAGA Claims

- Actions for civil penalties are subject to a **one year SOL**. Cal. Code Civ. Proc. § 340(a); *Brown v. Ralphs Grocery Co.*, 28 Cal. App. 5th 824 (2018).
- **Tolling during LWDA notice** period (*i.e.*, 65 days). Cal. Lab. Code § 2699.3(d).
- Therefore, ***in total***, the SOL is effectively 1 year and 65 days.
 - *But...what if the plaintiff doesn't file right away?*
 - No published decision has definitely addressed *when* the SOL runs if the PAGA claim is not initiated in court immediately after expiration of 65 days.
- Equitable tolling *may* not revive time-barred PAGA claims. See, *e.g.*, *Brown*, 28 Cal. App. 5th at 840.

Where Can PAGA Actions Be Filed?

- Certain courts may be perceived by one side or another as more favorable.
- *Crestwood Behavioral Health, Inc. v. Superior Court*, 60 Cal. App. 5th 1069 (2021):
 - Issue was whether a PAGA suit had to be filed either in the counties where the employer was principally based or where the plaintiff(s) worked vs. anywhere in the State.
 - Court of Appeal held that a PAGA action could be pursued:
 1. Where the plaintiff worked;
 2. Where the defendant is based; or
 3. Where any of the alleged Labor Code violations occurred.

Discovery in PAGA Cases

- In hybrid PAGA and class cases, some courts/judges will bifurcate discovery:
 1. Initial phase of discovery → class certification issues.
 2. Second phase of discovery → merits/damages (*i.e.*, PAGA issues).

*Note: *Not all courts take this approach.*
- PAGA plaintiffs **can** obtain discovery from other locations, *without a need to first demonstrate Labor Code violations.*
 - For years, employers (largely, in federal courts) were able to limit discovery to specific locations.
 - Williams v. Superior Court, 3 Cal. 5th 531 (2017):
 - Contact information for other locations was discoverable.

Challenging Representative Status

- PAGA claims are **not** subject to class certification requirements. *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).
- Some courts have granted motions to strike or deny representative status based on manageability.
 - See, e.g., *Amiri v. Cox Communications California, LLC*, 272 F. Supp. 3d 1187 (C.D. Cal. 2017); *Brown v. American Airlines, Inc.*, 2015 WL 6735217 (C.D. Cal. 2015); *Kahn v. Dunn-Edwards Corp.*, LA Super. Ct. (2016); *Wilson v. Activision Blizzard, Inc.*, LA Super. Ct. (2012).
 - **However**, other courts have rejected motions to strike PAGA claims or deny representative status.
 - E.g., *Rusom v. Tissue Banks I*, Contra Costa Super. Ct. (2017); *Zackaria v. Wal-Mart Stores, Inc.*, 142 F. Supp. 3d 949 (C.D. Cal. 2015); *Tseng v. Nordstrom, Inc.*, 2016 WL 7403288 (C.D. Cal. 2016).
- The California Supreme Court, in dicta, recognized manageability **is** a consideration. See *Williams v. Superior Court*, 3 Cal. 5th 531, 559 (2017) (“This is not to say uniform policies play no role in PAGA cases; proof of a uniform policy is one way a plaintiff might seek to render trial of the action manageable.”).
- Many ways to raise manageability issue:
 - Sometimes, affirmatively raised by court (e.g., by requiring trial plan).
 - Other times, defendants move for trial plan.
 - May be raised by motions (e.g., motion to strike, deny representative status, etc.).

PAGA Penalties

- Generally, either penalties in Labor Code (recoverable by Labor Commissioner) or PAGA’s “default” penalties:
 - \$100 for each aggrieved employee per pay period for the *initial* violation
 - \$200 for each aggrieved employee per pay period for each *subsequent* violation
- *Bernstein v. Virgin America, Inc.*, 990 F. 3d 1157 (9th Cir. 2021):
 - District court held that Virgin America was subject to the “heightened” penalties for subsequent Labor Code violations.
 - Ninth Circuit **reversed**:
 - No subsequent violation penalties available until the employer has been notified that it is violating a Labor Code provision – whether by the Labor Commissioner or a court.

No Recovery of Underlying (Alleged) Unpaid Wages

- Labor Code section 558 (“Section 558”):
 - Provides for initial penalty of \$50 for each initial violation “*in addition to an amount sufficient to recover underpaid wages.*”
 - Provides for a subsequent penalty of \$100 “*in addition to an amount sufficient to recover underpaid wages.*”
- For years, plaintiffs relied on *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112 (2012), to argue that, in addition to obtaining the PAGA penalties, they also could recover underlying unpaid wages under Section 558.
- *ZB, NA v. Superior Court*, 8 Cal. 5th 175 (2019):
 - PAGA penalties do **not** include the underlying unpaid wages.

Stacking or No Stacking? An unanswered question.

- “Stacking” = recovering multiple PAGA penalties in the same pay period for different Labor Code violations.
- Statutory language:
 - Labor Code § 2699(f): “For all provisions of this code except those for which a civil penalty is specifically provided, there is established **a civil penalty** for a violation of these provisions...”
 - Labor Code § 2699(g)(1): “[A]n aggrieved employee may recover **the civil penalty** described in subdivision (f) in a civil action ... on behalf of himself or herself and other current or former employees against whom **one or more** of the alleged violations was committed.”
- The California Supreme Court has not definitively resolved whether plaintiffs pursuing PAGA claims can obtain “stacked” PAGA penalties.

Reduction of PAGA Penalties by Court

- Labor Code section 2699(e)(2):

In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is **unjust, arbitrary and oppressive, or confiscatory**
- Some courts have reduced PAGA penalties awarded:
 - Thurman v. Bayshore Transit Management, Inc., 203 Cal. App. 4th 1112, 1135-36 (2012) (reducing PAGA penalties by 30%).
 - Fleming v. Covidien Inc., 2011 WL 7563047, at *4 (C.D. Cal. Aug. 12, 2011) (reducing PAGA penalties for pay stub violation from \$2.8 million to \$500,000 (roughly 18% of full value)).

Resolving PAGA Claims



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PAGA Settlement Litigation Data

- According to data obtained by the California Business and Industrial Alliance from the LWDA:
 - 9,208 PAGA cases filed and resolved through private litigation
 - Average PAGA settlement amount: \$732,635
 - Most PAGA actions filed in the following regions:
 1. Los Angeles County (37%)
 2. Remaining LA Basin (17%)
 3. Bay Area (17%)
 - *Highest average settlement amount*
 4. San Diego (8%)
 5. Central Valley (7%)
 - *Lowest average settlement amount*

“Pay Periods” Drive Value of Claims

- PAGA defines standing “in terms of violations, not injury.” *Kim v. Reins* (2020) 9 Cal.5th 73.
- Civil penalties are assessed based on the number of pay periods, per employee, in which a violation was committed.
 - Semimonthly, bi-weekly, and weekly pay periods
- Largely Irrelevant Data
 - Number of workweeks
 - Rates of pay
- Indirectly Relevant Data
 - Amount of allegedly unpaid wages
 - Value of claim if brought in the employee’s individual capacity

Effect of the Court's Discretion Award Less Than Max. Penalty

- Court's Discretion to Significantly Reduce Penalty Assessment (2699(e)(2))
 - 90+% (substantial compliance with meal/rest requirements) Carrington v. Starbucks Corp., 30 Cal.App.5th 504 (2018)
 - 94% (non-willful wage statement violations) Parr v Golden State Overnight, 2014 WL 11199453 (Cal.Super. July 10, 2014).
 - 87% (13% meal break violation rate) Kaanaana v. Barrett Business Services, 29 Cal.App.5th 778, 787 (2018).
 - 82% (226 violations) Fleming v. Covidien, 2011 WL 7563047 (C.D. Cal. Aug. 12, 2011).
 - 80% (untimely final pay & 226, inclusive pay period dates) Magadia v. Wal-Mart, 2019 WL 2317181 (N.D. Cal. May 31, 2019).
 - 75% (multiple violations) Cerritos v United Farm Workers, 2017 WL 7805402 (Cal.Super. May 05, 2017).
 - 72% (multiple violations) Kennedy v Arm Strong Towing, 2017 WL 9486773 (Cal.Super. Dec. 07, 2017).
 - 72% (226 violations) Aguirre v. Genesis Logistics, 2013 WL 10936035 (C.D. Ca 2013).

Settling PAGA Claims

- Court approval required (§ 2699(l)(2))
 - By motion or stipulation
- Submission of Proposed Settlement to LWDA required, but LWDA approval not required.
- LWDA rarely provides guidance, but if it does, the court will likely rely on it in deciding approval.
- Additional approval requirements if claims involve workplace health and safety issues. (§ 2699.3(b)(4))



Settling PAGA Claims

- LC 2699(1)(2) provides no specific guidance to the court regarding “review and approval” of PAGA settlement.
 - Must be “fair to those affected.” Williams, 3 Cal. 5th at 549.
 - Courts frequently consider:
 - PAGA’s purpose – to encourage Labor Code compliance and deter noncompliance.
 - Non-monetary relief
 - Factors used to assess class action settlements - “fair, adequate, and reasonable.”
- Notice to aggrieved employees not required in “PAGA only” lawsuits.



Potential Challenges to PAGA Settlements



- “[T]here is no mechanism for opting out of the judgment entered on the PAGA claim.” (*Robinson v. Southern Counties Oil Company*)
- Non-party, allegedly aggrieved employees with their own, separate PAGA actions may have standing to appeal a PAGA settlement where “the settlement agreement will preclude him from pursuing his PAGA claims.” (*Alonzo v. First Transit, Inc.*)

Hot PAGA Issues



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Stays of PAGA Claims Pending Arbitration

- Issue: If non-PAGA claims are arbitrable, but PAGA claims are not, then should the trial court stay the PAGA claims while the non-PAGA claims get arbitrated?
 - *Franco v. Arakelian*, 234 Cal. App. 4th 947 (2015)
 - *But see Jarboe v. Hanlees Auto Group*, 53 Cal.App.5th 539 (2020)
 - “Because a PAGA claim is representative and does not belong to an employee individually, an employer should not be able to dictate how and where the representative action proceeds.”

PAGA and COVID-19

- We are already seeing lawsuits alleging wage/hour violations related to COVID-19-specific work conditions.
 - *E.g., Atienza v. Homegoods, Inc.*, Contra Costa Super. Ct. (filed March 22, 2021).
 - Alleges unpaid time related to mandatory temperature checks for COVID-19 screening.
- Broader question: *Can (and will) plaintiffs pursue PAGA claims based on new Labor Code sections enacted during COVID-19?*

PAGA Claims Alleging Health and Safety Code Violations

- Claims based on allegedly unsafe workplaces
 - Failure to Furnish Safety Devices, Use Safeguards
 - Maintain/Use Safe Practices/Procedures
 - Injury and Illness Prevention Program (IIPP)



Hot Topics: The Right to a Jury Trial in PAGA Actions

- Does an aggrieved employee, seeking civil penalties on behalf of the state as a proxy for California's labor law agencies, have the right to demand a jury trial?
 - Equitable vs. Legal Causes of Action
 - Nationwide Biweekly v. Superior Court
 - Causes of action established by the UCL and FAL are equitable in nature and are properly tried by the court rather than a jury.
 - LaFace v. Ralphs
 - Aggrieved employee's right to a jury trial in a PAGA suitable seating action?

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**Thank you for joining us.
Please feel free to contact us if you have any questions.**

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