

SOME PROCEDURAL CONSIDERATIONS FOR RECOVERY OF EXPERT COSTS & FEES IN PAGA CASES

FEES ARE RECOVERABLE UNDER PAGA CLAIMS

Labor Code section 2699 (g) (1) states: “Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs.”

ATTORNEY FEES FOR MEAL AND REST PERIODS ONLY RECOVERABLE IF WE ASSERT PAGA

Problem:

Kirby v. Amos (2012) 53 Cal.4th 1244 – Attorney fees not recoverable for meal and rest periods under Labor Code sections 226.7, 218.5 or 1194.

Potential Solution:

However, fees are recoverable for PAGA claims pursuant to LC §§2699 (g) (1) above and 2699.5 which specifically lists LC 226.7. Furthermore, attorney fees need not be apportioned where the fees are incurred on an issue common to the causes of action where fees are common and those in which they are not. See *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130 (“Attorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed.”); see also *Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 Cal.App.4th 1127, 1133 (“When the liability issues are so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not, then allocation is not required.”)

OFFERS TO COMPROMISE

Problem:

Defense will sometimes make small global offer to create conflict with clients.

Potential Solution:

CCP §998 Offers to Compromise can be used to counter *global* offers made by defense as a tactic to create potential conflict with clients. Consider carve out of PAGA claims, costs/fees. “Section 998 does not require a plaintiff to make a global settlement offer to all defendants in an action, or to make an offer that resolves all aspects of a case.” *Arno v. Helinet Corp.* (2005) 130 Cal.App.4th 1019, 1026. Expert costs recovered with PAGA/cost/fee carve-out in San Diego Superior Court wage/PAGA case in post trial motion to tax costs in *Atempa et. al. v Pama Inc., et.al.* SDSC Case No. 37-2013-58208-CU-OE-CTL.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

MARCO ANTONIO ATEMPA, an
individual; KEILYN REYES, an individual

Plaintiffs,

v.

PAMA, INC., a California Corporation doing
business as VIA ITALIA TRATTORIA;
PAOLO PEDRAZZANI, individually and
doing business as PAMA, INC.; and DOES 1
through 100, inclusive,

Defendants.

CASE NO.: 37-2013-58208-CU-OE-CTL

~~[PROPOSED]~~ SECOND AMENDED
JUDGMENT AFTER TRIAL

Judge: The Hon. Joel R. Wohlfeil
Department: C-73

PAMA, INC., a California Corporation doing
business as VIA ITALIA TRATTORIA,

Cross-Complainant.

v.

MARCO ANTONIO ATEMPA, an individual;
and ROES 1 through 50, inclusive,

Cross-Defendants.

This action came on regularly for a bench trial on January 28, February 2-5, 11, 17, and 18, and April 16, 2015, before the Honorable Joel R. Wohlfeil, Judge presiding, in Department C-73 of the Superior Court. Plaintiffs MARCO ANTONIO ATEMPA and KEILYN REYES (collectively "Plaintiffs") appeared along with their attorneys Rodolfo Ruiz-Velasco, Esq. and

1 Thomas Diachenko, Esq. Defendant PAMA, INC. appeared along with its attorney Christopher
2 W. Olmsted, Esq., and Defendant PAOLO PEDRAZZANI appeared along with his attorney
3 Frank E. Noble, Esq.

4 Witnesses were sworn and testified. After hearing the evidence and arguments of counsel,
5 the Court took the matter under submission. On April 16, 2015, the Court issued a Statement of
6 Intended Decision ("SOID"). On May 22, 2015, the Court heard argument from counsel for
7 Plaintiffs and Defendants regarding objections by Plaintiffs and Defendants to the SOID. On
8 May 22, 2015, the Court entered an award for PAGA penalties. On June 5, 2015, the Court heard
9 argument from counsel for Plaintiffs and Defendants regarding Labor Code §558 penalties. On
10 June 5, 2015, the Court entered an award for Labor Code §558 penalties.

11 NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED:
12

13 1. That Plaintiff MARCO ANTONIO ATEMPA has judgment against Defendant
14 PAMA, INC., a California Corporation doing business as VIA ITALIA TRATTORIA (herein
15 after also referred to as "PAMA") in the sum of \$26,824.00 for unpaid overtime wages,
16 \$1,272.00 for unpaid minimum wages, \$6,089.00 for meal period premium wages, \$12,071.00
17 for rest period premium wages, \$4,000.00 for Labor Code §226(e) penalties and \$3,574.00 for
18 Labor Code §203 waiting time penalties, all of which total \$53,830.00 (Fifty Three Thousand
19 Eight Hundred Thirty Dollars), and against both Defendants PAMA and PAOLO
20 PEDRAZZANI, jointly and severally, in the sum of \$1,937.00 for Labor Code §558 penalties.
21

22 2. That Plaintiff MARCO ANTONIO ATEMPA shall also recover from Defendant,
23 PAMA pre judgment interest pursuant to Labor Code §§ 218.5, 1194, Civil Code §§ 3287, 3289
24 on the amount awarded of \$46,256 for prejudgment interest in the amount of \$16,228 until
25 January 25, 2015 and prejudgment interest thereafter at the rate of ten percent (10%) per annum,
26
27
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1 to the date of entry of the original judgment (which occurred July 31, 2015) in the amount of
2 \$12.67 per day (for 187 days) for a total of \$2,369.25 in prejudgment interest.

3 3. That Plaintiff MARCO ANTONIO ATEMPA shall recover against Defendant
4 PAMA, post-judgment interest on the amount of \$53,830.00 plus interest on wages at a rate of
5 ten percent (10%) per annum from the date of entry of judgment until paid in the amount of
6 \$14.75 per day.

7
8 4. That Plaintiff MARCO ANTONIO ATEMPA shall recover from all Defendants
9 (PAMA and PAOLO PEDRAZZANI, jointly and severally) post-judgment interest on the
10 amount awarded for Labor Code §558 penalties of \$1,937.00 at a rate of ten percent (10%) per
11 annum from the date of entry of judgment until paid in the amount of \$0.53 per day.

12
13 5. That Plaintiff KEILYN REYES has judgment against Defendant PAMA in the
14 sum of \$8,195.00 for unpaid minimum wages, \$3,104.00 for meal period premium wages,
15 \$4,738.00 for rest period premium wages, \$4,000 for Labor Code §226(e) penalties and
16 \$2,389.00 for Labor Code §203 waiting time penalties all of which total \$22,426.00 (Twenty
17 Two Thousand Four Hundred Twenty Six and 0/100 Dollars) and against both Defendants
18 PAMA and PAOLO PEDRAZZANI, jointly and severally, in the sum of \$2,036 for Labor Code
19 §558 penalties.

20
21 6. That Plaintiff KEILYN REYES shall also recover from Defendant PAMA, pre
22 judgment interest pursuant to Labor Code §§ 218.5, 1194, Civil Code §§ 3287, 3289 on the
23 amount awarded of \$16,027 for prejudgment interest in the amount of \$3,832 until January 25,
24 2015 and prejudgment interest thereafter at the rate of ten percent (10%) per annum, to the date
25 of entry of the original judgment (which occurred July 31, 2015) in the amount of \$4.39 per day
26 (for 187 days) for a total of \$820.95 in prejudgment interest.

27 ///

1 7. That Plaintiff KEILYN REYES shall recover against Defendant PAMA post-
2 judgment interest on the entire amount of the judgment of \$22,426.00 at a rate of ten percent
3 (10%) per annum from the date of entry of the judgment until paid in the amount of \$6.14 per
4 day.

5 8. That Plaintiff KEILYN REYES shall recover from all Defendants (PAMA and
6 PAOLO PEDRAZZANI, jointly and severally) post-judgment interest on the amount of the
7 judgment awarded for Labor Code §558 penalties of \$2,036.00 at a rate of ten percent (10%) per
8 annum from the date of entry of the judgment until paid in the amount of \$0.56 per day.

9 9. That Plaintiffs, on behalf of themselves, the State of California and of all the
10 aggrieved employees, have judgment against Defendant PAMA in the sum of \$170,333.00 for
11 PAGA penalties for meal and rest period violations, of which 75% is to be distributed to the
12 State of California and 25% is to be distributed to the aggrieved employees in proportion to the
13 violations they each suffered.

14 10. Plaintiffs on behalf of themselves the state of California and all aggrieved
15 employees shall recover from the defendant PAMA post judgment interest from the date of entry
16 of the original judgment (which occurred July 31, 2015) in the amount of \$46.67 per day.

17 11. That Plaintiffs, on behalf of themselves, the State of California and of all the
18 aggrieved employees, have judgment against Defendant PAMA and against Defendant PAOLO
19 PEDRAZZANI, jointly and severally, in the sum of \$27,101.00 for Labor Code §1197.1
20 penalties, of which 75% is to be distributed to the State of California and 25% is to be distributed
21 to the aggrieved employees in proportion to the violations they each suffered.

22 12. That Plaintiffs, on behalf of themselves, the State of California and of all the
23 aggrieved employees, shall recover from all Defendants (PAMA and PAOLO PEDRAZZANI,
24 jointly and severally) post-judgment interest on the amount of the judgment Labor Code §1197.1

1 penalties of \$27,101.00 at a rate of ten percent (10%) per annum from the date of entry of the
2 original judgment (which occurred July 31, 2015) until paid in the amount of \$7.42 per day.

3 13. That Plaintiffs shall recover from Defendant, PAMA, costs in the amount of
4 \$47,983.45 plus 10% interest per annum from the date of entry of the first amended judgment in
5 the amount of \$13.15 per day until paid, and attorney fees in the amount of \$380,014.00 (Three
6 Hundred Eighty Thousand Fourteen Dollars and 1/100) plus 10% interest per annum from the
7 date of entry of this second amended judgment in the amount of \$104.11 per day until paid.

8 14. That of the above costs and fees awarded, Plaintiffs shall also recover from
9 Defendant, PAOLO PEDRAZZANI (jointly and severally with PAMA) costs in the lesser
10 included amount of \$30,139.07 plus 10% interest per annum from the date of entry of the first
11 amended judgment in the amount of \$8.26 per day until paid, and attorney fees in the lesser
12 included amount of \$315,014.00 (Three Hundred Fifteen Thousand Fourteen and 0/100) plus
13 10% interest per annum from the date of entry of this second amended judgment in the lesser
14 included amount of \$86.31 per day until paid.

15 15. That Defendant PAMA shall recover from Plaintiff MARCO ANTONIO
16 ATEMPA \$1,108.00, plus pre-judgment interest pursuant to Civil Code §§ 3287, 3289 on the
17 amount awarded of at the rate of ten percent (10%) per annum, from July 1, 2012 to the date of
18 entry of the original judgment (which occurred July 31, 2015) in the amount of \$0.30 per day
19 (for 917 days) which amounts to \$275.10, plus post-judgment interest at a rate of ten percent
20 (10%) per annum from the date of entry of the judgment until paid in the amount of \$0.30 per
21 day.

22 01/05/2016

23 Dated: ~~November~~ _____, 2015

24 

25 Hon. Joel R. Wohlfeil
26 Judge of the Superior Court
27
28

3 **PROOF OF SERVICE**

4 I am employed in the County of San Diego, State of California. I am over eighteen years
5 of age and not a party to this action; my business address is 1916 Third Avenue, San Diego,
6 California, 92101.

7 On **November 6, 2015**, I served a true copy of the foregoing document(s):

8 **NOTICE OF COURT'S RULING ON PLAINTIFFS' MOTION TO RECOVER**
9 **ATTORNEYS' FEES FROM DEFENDANTS AND PLAINTIFFS' MOTION FOR COSTS**
10 **OF PROOF SANCTIONS PURSUANT TO CCP SECTION 2033.420**


11 **[PROPOSED] SECOND AMENDED JUDGMENT AFTER TRIAL**

12 on all interested parties in this action as follows:

13 Christopher W. Olmsted 14 Oagletree Deakins 15 4370 La Jolla Village Drive, Suite 990 16 San Diego, CA 92122 17 Fax 858-652-3101 18 christopher.olmsted@ogletreedeakins.com	19 Attorneys for 20 Defendant PAMA, 21 Inc.
22 Frank E. Noble 23 850 Beech Street, Suite 803 24 San Diego, CA 92101 25 619-239-2250 26 franknoble@yahoo.com	27 Attorneys for 28 Defendant Paolo Pedrazzani

29 ☐ **U.S. MAIL:** I am readily familiar with the firm's practice of collection and processing
30 correspondence for mailing. Accordingly, the above-referenced document(s) were
31 enclosed in a sealed envelope which, in the ordinary course of business, will be deposited
32 with the United States Postal Service the same day; and said envelope was addressed as
33 shown on the attached service list.

34 I declare under penalty of perjury under the laws of the State of California that the
35 foregoing is true and correct. Executed on **November 6, 2015** at San Diego, California.

36 
37 Rodolfo Ruiz-Velasco
38

The Ins and Outs of Litigating a Representative Action Under the Private Attorneys General Act (PAGA)

Cynthia L. Rice
Director of Litigation, Advocacy & Training
California Rural Legal Assistance, Inc.
2015

STATE LABOR LAW ENFORCEMENT

- ❑ ENACTMENT OF STATUTORY AND REGULATORY PROTECTIONS
- ❑ ESTABLISHMENT OF A POLICE POWERS ENFORCEMENT AGENCY – DLSE
- ❑ ESTABLISHMENT OF ADMINISTRATIVE FORUM FOR LABOR LAW ENFORCEMENT – LABOR COMMISSIONER
- ❑ PRIVATE RIGHTS OF ACTION TO SUE

WHY PAGA

“It is therefore in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general, while also ensuring that state labor law enforcement agencies' enforcement actions have primacy over any private enforcement efforts undertaken pursuant to this act.”

#NELA16 929 Stats 2003 ch 906 § 2 (SB 796)

WHAT IT DOES DO

- ▣ ALLOWS AN INDIVIDUAL WORKER TO RECOVER PENALTIES WHICH WOULD NORMALLY GO TO THE STATE FOR VIOLATIONS OF CALIFORNIA LABOR LAW
 - PENALTIES FOR VIOLATIONS AGAINST THE PLAINTIFF WORKER
 - PENALTIES FOR OTHER AGGRIEVED WORKERS

STANDING IN THE SHOES OF THE STATE

A PAGA representative action is therefore a type of qui tam action.

“Traditionally, the requirements for enforcement by a citizen in a qui tam action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty.”

...The PAGA conforms to these traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation. The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit.

#NELA16 931
Iskanian v. CLS Transportation Los Angeles, LLC, (2014) 59 Cal. 4th 348

WHAT IT DOESN'T DO

- ❑ DOES NOT ALLOW FOR ENFORCEMENT OF LAWS NOT CONTAINED IN THE LABOR CODE
- ❑ DOES NOT ALLOW FOR ENFORCEMENT OF NOTICE AND RECORD KEEPING VIOLATIONS DOES NOT ALLOW FOR ENFORCEMENT OF WORKERS COMPENSATION LAW VIOLATION
- ❑ DOES NOT ALLOW FOR INJUNCTIVE RELIEF
- ❑ DOES NOT ALLOW AN INDIVIDUAL WORKER TO **DIRECTLY** RECOVER WAGES FOR OTHER EMPLOYEES

A PROXY FOR THE LABOR COMMISSIONER

“An aggrieved employee acting as the proxy or agent of the Labor and Workforce Development Agency by bringing an action under the Private Attorneys General Act of 2004, Lab. Code, § 2698 et seq., **may recover underpaid wages as a civil penalty under Lab. Code, § 558.**”

Thurman v. Bayshore Transit Management, Inc.,
203 Cal. App. 4th 1112 (Cal. App. 4th Dist. 2012)

WHAT IT DOES DO

- ❑ ALLOWS AN INDIVIDUAL WORKER TO BRING A LAWSUIT TO COLLECT **PENALTIES** FOR HIMSELF AND ALL OTHER WORKERS AFFECTED BY VIOLATIONS OF CALIFORNIA LABOR LAWS
- ❑ CREATES A NEW PENALTY FOR LABOR MANDATES THAT DO NOT HAVE A SPECIFIC PENALTY UNDER THE LABOR CODE
- ❑ ALLOWS FOR THE RECOVERY OF REASONABLE ATTORNEYS FEES AS A MATTER OF RIGHT TO **PREVAILING EMPLOYEE**. LC 2699(g)
- ❑ BOOTSTRAPS PENALTIES RECOVERABLE BY THE DLSE, INCLUDING THOSE UNDER LC 558, 1197.1

ALLOWS RECOVERY OF “RESTITUTION” OF UNPAID WAGES FOR AGGRIEVED EMPLOYEES THROUGH LABOR CODE SECTION 558

558. Civil penalties

(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter **or any provision regulating hours and days of work in any order of the Industrial Welfare Commission** shall be subject to a civil penalty as follows:

(1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid **in addition to an amount sufficient to recover underpaid wages.**

(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid **in addition to an amount sufficient to recover underpaid wages.**

(3) Wages recovered pursuant to this section shall be paid to the affected employee.

ALLOWS RECOVERY OF "RESTITUTION" OF UNPAID MINIMUM WAGES AND CONNECTED STATUTORY PENALTIES FOR AGGRIEVED EMPLOYEES THROUGH LABOR CODE SECTION 1197.1

- ❑ a) Any employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission shall be subject to a civil penalty, restitution of wages, **liquidated damages payable to the employee, and any applicable penalties imposed pursuant to Section 203 as follows:**
 - ❑ (1) For any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid. **This amount shall be in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203.**
 - ❑ (3) **Wages , liquidated damages, and any applicable penalties imposed pursuant to Section 203, recovered pursuant to this section shall be paid to the affected employee.**

ALLOWS RECOVERY AGAINST ANY ENTITY AGAINST WHOM THE PENALTY LIES – INCLUDING CORPORATE OFFICERS THROUGH LABOR CODE SEC 558 and SEC 1197.1

“...the Private Attorneys General Act which, in time, may provide workers with a mechanism for recovering unpaid overtime wages through private enforcement of section 558, which authorizes civil penalties for violations of the wage laws that include unpaid wages from “[a]ny employer or other person acting on behalf of an employer,” a phrase conceivably broad enough to include corporate officers and agents in some cases. ”

Reynolds v. Bement (2005) 36 C 4th 1075,1094, Moreno concurring, citing Labor Code sec. 558

ELEMENTS OF A PAGA CLAIM

- ❑ AN AGGRIEVED EMPLOYEE
- ❑ VIOLATIONS OF CALIFORNIA LABOR CODE BY A PERSON AGAINST AN AGGRIEVED EMPLOYEE WITHIN THE STATUTORY PERIOD OF ONE YEAR
 - MAY ALSO ALLEGE VIOLATIONS OF CALIFORNIA LABOR CODE BY A PERSON AGAINST OTHER CURRENT OR FORMER EMPLOYEES
- ❑ NOTICE TO LABOR AGENCY AND EXHAUSTION OF TIME LIMITS FOR INVESTIGATION

PENALTIES AVAILABLE

- ❑ ANY PROVISION OF THIS CODE THAT PROVIDES FOR A CIVIL PENALTY TO BE ASSESSED AN AMOUNT EQUAL TO THE PENALTY PROVIDED BY LAW

- ❑ FOR ALL PROVISIONS OF THE CODE FOR WHICH NO CIVIL PENALTY IS ESTABLISHED:
 - \$100 FOR EACH AGGRIEVED EMPLOYEE PER PAY PERIOD FOR THE INITIAL VIOLATION AND \$200 FOR EACH AGGRIEVED EMPLOYEE PER DAY FOR EACH SUBSEQUENT VIOLATION
 - Per *Amaral v. Cintas* (2008) 163 Cal. App. 4th 1157 “subsequent” violation only occurs after “notice of a previous violation”

EXAMPLES OF “CIVIL” PENALTIES WHICH SHOULD BE SOUGHT UNDER 2699

- ❑ LC 210 PENALTIES FOR FAILURE TO PAY WAGES DUE
- ❑ LC 225.5 PENALTIES FOR UNLAWFUL DEDUCTIONS, KICKBACKS, BAD CHECKS
- ❑ LC 226.3 PENALTIES FOR WAGE STUB VIOLATIONS
- ❑ LC 354 PENALTIES FOR TIP VIOLATIONS
- ❑ LC 1197.1 PENALTIES FOR NOT PAYING MINIMUM WAGE
- ❑ LC 558 PENALTIES FOR VIOLATING WAGE ORDER – INCLUDING UNPAID WAGES DUE, INCLUDING THOSE FOR MISSED MEAL AND REST PERIODS
- ❑ LC 1197.1 PENALTIES FOR MINIMUM WAGE
- ❑ LC 1198 PENALTIES FOR VIOLATING WAGE ORDER PROVISIONS REGARDING WORKING CONDITIONS

EXAMPLES OF “STATUTORY” PENALTIES WHICH SHOULD **NOT** BE SOUGHT UNDER 2699

- ❑ LC 203 PENALTIES FOR FAILURE TO PAY WAGES DUE ON TERMINATION
- ❑ LC 226 PENALTIES FOR WAGE STUB VIOLATIONS
- ❑ LC 226.7 COMPENSATION FOR MEAL AND REST PERIODS
- ❑ LC 1194.2 LIQUIDATED DAMAGES FOR FAILURE TO PAY MINIMUM WAGE

***Caliber Bodyworks v. Superior Court* (2005) 134 Cal. App. 4th 365**

NOTICE AND EXHAUSTION REQUIREMENTS

- ❑ VIOLATION OF “SERIOUS” LABOR CODE PROVISIONS IDENTIFIED IN 2699.5
 - MOST WAGE AND HOUR VIOLATIONS
 - VIOLATIONS OF WAGE ORDER HOURS AND WORKING CONDITIONS PROVISIONS (LC 1198)
 - DOES NOT INCLUDE VIOLATIONS OF WAGE ORDER THAT ARE NOT OTHERWISE STATUTORILY MANDATED
- ❑ VIOLATION OF OTHER LABOR CODE PROVISIONS
- ❑ VIOLATIONS OF OSHA PROVISIONS

NOTICE AND EXHAUSTION REQUIREMENTS FOR “**SERIOUS VIOLATIONS**” 2699.3(a)

- ❑ WRITTEN NOTICE BY CERTIFIED MAIL TO THE LABOR AND WORKFORCE DEVELOPMENT AGENCY (LWDA) AND THE EMPLOYER INCLUDING
 - SPECIFIC PROVISIONS OF CODE VIOLATED
 - FACTS AND THEORIES TO SUPPORT VIOLATIONS
- ❑ NOTICE BY MAILING A COPY OF THE FILED COMPLAINT OK
- ❑ LWDA HAS 33 DAYS TO NOTIFY EMPLOYEE AND EMPLOYER OF WHETHER IT INTENDS TO INVESTIGATE THE ALLEGATIONS, IF NO NOTICE OR INVESTIGATION COMMENCED EMPLOYEE MAY SUE IF LWDA INDICATES WILL INVESTIGATE
- ❑ MUST NOTIFY EMPLOYEE AND EMPLOYER WITHIN 125 DAYS AFTER DECISION TO INVESTIGATE, MUST NOTIFY AGGRIEVED EMPLOYEE AND EMPLOYER OF CITATION OR THAT NO CITATION WILL ISSUE
 - IF CITE, NO ACTION MAY BE FILED
 - IF FAIL TO CITE ACTION MAY BE FILED

NOTICE AND EXHAUSTION REQUIREMENTS FOR **OTHER** LABOR LAW VIOLATIONS

2699.3(c)

WRITTEN NOTICE BY CERTIFIED MAIL TO THE LABOR
AND WORKFORCE DEVELOPMENT AGENCY (LWDA)
AND THE EMPLOYER INCLUDING

- SPECIFIC PROVISIONS OF CODE VIOLATED
- FACTS AND THEORIES TO SUPPORT VIOLATIONS
- EMPLOYER MAY “CURE”
- IF NOT CURED, MAY COMMENCE CIVIL ACTION AFTER COMPLIANCE WITH EXHAUSTION REQUIREMENTS OF 2699(a)

EMPLOYER MAY “CURE” “OTHER VIOLATIONS”

- ❑ EMPLOYER MAY CURE THE ALLEGED VIOLATION WITHIN 33 DAYS OF POSTMARK OF NOTICE
- ❑ EMPLOYER MUST GIVE NOTICE TO AGGRIEVED EMPLOYEE AND LWDA BY CERTIFIED MAIL OF “CURE” WITHIN 33 DAYS
- ❑ NOTICE MUST INCLUDE DESCRIPTION OF ACTIONS TAKEN BY EMPLOYER TO CURE
- ❑ IF CURED EMPLOYEE MAY NOT COMMENCE CAUSE OF ACTION

EMPLOYEE MAY CHALLENGE CLAIM VIOLATION CURED

- ❑ MUST FILE WRITTEN NOTICE BY CERTIFIED MAIL TO EMPLOYER AND LWDA DISPUTING CURE
- ❑ LWDA MUST REVIEW THE ACTIONS TAKEN BY THE EMPLOYER AND ISSUE DECISION WITHIN 17 DAYS OF DISPUTE NOTICE
 - MAY GIVE EMPLOYER ADDITIONAL 3 DAYS
- ❑ IF LWDA DECIDES IT HAS NOT BEEN CURED EMPLOYEE MAY COMMENCE ACTION
- ❑ IF LWDA DECIDES IT HAS BEEN CURED EMPLOYEE MAY CHALLENGE THAT DECISION BY AN APPEAL TO SUPERIOR COURT
 - THIS IS LIKELY A WRIT, WHICH IF SUCCESSFUL WOULD ALLOW EMPLOYEE TO PROCEED WITH THE CAUSE OF ACTION

NOTICE AND EXHAUSTION REQUIREMENTS FOR OSHA VIOLATIONS

- ❑ WRITTEN NOTICE BY CERTIFIED MAIL TO LWDA, OSHA AND THE EMPLOYER INCLUDING
 - SPECIFIC PROVISIONS OF CODE VIOLATED
 - FACTS AND THEORIES TO SUPPORT VIOLATIONS
- ❑ DOSH SHALL INSPECT OR INVESTIGATE THE ALLEGED VIOLATION CONSISTENT WITH STATUTORY MANDATES (LC 6309)
 - WITHIN 3 WORKING DAYS AFTER COMPLAINT OF A SERIOUS VIOLATION
 - WITHIN 14 WORKING DAYS AFTER COMPLAINT OF A NON-SERIOUS VIOLATION.
- ❑ IF DOSH FAILS TO INSPECT OR INVESTIGATE WITHIN TIME FRAMES PROVIDED BY 6309 THEN MAY PROCEED IN SAME MANNER AS FOR OTHER LABOR VIOLATIONS, INCLUDING EMPLOYER RIGHT TO CURE

Adequacy of the LWDA Notice

LC 2699.3 requires

“written notice of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violations”

“...a string of legal conclusions with no factual allegations or theories of liability to support them—is insufficient to allow the Labor and Workforce Development Agency to intelligently assess the seriousness of the alleged violations. Neither does it provide sufficient information to permit the employer to determine what policies or practices are being complained of so as to know whether to fold or fight. *Alcantar v. Hobart Serv.*, 2015 U.S. App. LEXIS 15687 (9th Cir. Cal. Sept. 3, 2015) MSJ granted.

AMENDMENT AS OF RIGHT

AFTER COMPLIANCE WITH APPLICABLE
NOTICE AND EXHAUSTION REQUIREMENTS
EMPLOYEE MAY AMEND PENDING
COMPLAINT AS A MATTER OF RIGHT TO
INCLUDE THE 2699 CAUSE OF ACTION
WITHIN 60 DAYS OF TIME PERIODS SET
OUT IN STATUTE 2699(a)(2)(C)

NO ARBITRATION WAIVER

Iskanian v. CLS Transportation Los Angeles, LLC
(2014) 59 Cal.4th 348 (US Sup Rev. Denied)

- AT&T does NOT permit arbitration agreements to override the statutory right to bring representative claims under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, 2698 et seq.)
- But, defendant did not waive its right to compel arbitration as to other issues
 - See also, *Montano v. Wet Seal Retail, Inc* , 2015 Cal. App. LEXIS 29 (Cal. App. 2d Dist., Jan. 13, 2015) non-severability clause in agreement applied to deny arbitration of all causes; *Williams v Pinkerton*, June 9, 2015, 2nd DCA, cannot be forced to arbitrate underlying individual claim in an action alleging only PAGA.
 - Court determines whether class arbitration allowed under agreement in most circumstances, *Universal Protection Service, LP v. Superior Court* (2015) 239 Cal. App. 4th 697, but see *Garden Fresh Restaurant Corp. v. Superior Court* (2014) 231 Cal.App.4th 678 if there is clear and unmistakable evidence of the parties' intent to vest the arbitrator with the power to decide, then issue goes to arbitrator.
- Many U.S. Dist Courts are not following Iskanian
- Trial Courts are Granting Arbitration of Underlying claims and staying the PAGA action in many cases
- However, cannot split the PAGA claim and send individual PAGA claim to arbitration stay representative claims. *Williams v. Superior Court*(2015) 237 Cal. App. 4th 642

EMPLOYER DEFENSES

- ❑ NO ACTION MAY FILED IF THE LWDA OR ITS DEPARTMENTS HAS ISSUED A CITATION ON THE SAME FACTS AND THEORIES OR INITIATED AN ACTION UNDER LC 98.3
- ❑ CLAIMS ALLEGED IN THE COMPLAINT NOT ALLEGED IN THE LWDA LETTER
- ❑ RES JUDICATA/COLLATERAL ESTOPPEL
- ❑ STATUTE OF LIMITATION
 - ONE YEAR
 - THREE YEARS FOR 558 RESTITUTION?

COURT APPROVAL REQUIRED OF SETTLEMENTS

- ❑ THE SUPERIOR COURT SHALL REVIEW AND APPROVE ANY PENALTIES SOUGHT AS A PART OF A PROPOSED SETTLEMENT AGREEMENT PURSUANT TO THIS PART
- ❑ \$0 AMOUNT FOR 2698 PENALTIES MAY BE APPROVED, SO LONG AS JUSTIFIED IN THE SETTLEMENT (*Nordstrom Com. Cases* (2010)186 Cal. App. 4th 576

APPORTIONMENT OF PENALTIES

- ▣ 75% OF PENALTIES COLLECTED SHALL BE DISTRIBUTED TO THE LWDA FOR ENFORCEMENT OF LABOR LAWS AND EDUCATION OF EMPLOYERS
- ▣ 25% OF PENALTIES TO BE PAID TO THE AGGRIEVED EMPLOYEES
- ▣ 100% OF WAGES RECOVERED AS PART OF LABOR CODE SECTION 558 OR 1197.1 PENALTY GOES TO WORKER

CLASS ACTION IMPLICATIONS

❑ CLASS CERTIFICATION NOT NECESSARY

- State: PAGA suits are not subject to class certification requirements. *Arias v. Superior Court* (2009) 46 Cal. 4th 969 (2009)
- Federal: Undecided. The 9th Circuit has not decided whether plaintiffs bringing representative PAGA claims in federal court must satisfy the requirements of Rule 23. District Courts are Split, (but see Baumann, below)

❑ PAGA is not sufficiently similar to Rule 23 for removal purposes under CAFA. *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117 held that PAGA is not sufficiently similar to Rule 23 for removal purposes under CAFA.

❑ MIXED CLASS AND PAGA CLAIMS MAY BE BROUGHT

- Denial of class cert is not “death knell” with right to appeal if PAGA claims survive. *Munoz v. Chipotle Mexican Grill, Inc.* (2015) 238 Cal. App. 4th 291

EMERGING ISSUES

❑ MANAGEABILITY

- Claims dismissed based on failure to meet standards akin to typicality and commonality, but phrased as manageability

❑ STATUTE OF LIMITATIONS

- DOES THE LWDA LETTER TOLL?
- 1 YEAR VERSUS 3 YEARS ON 558 CLAIMS

❑ BANKRUPTCY DISCHARGEABILITY

- Medina v Vander Poel, ED CA Jan 21, 2015, 2015 U.S. Dist. LEXIS 6767 – not dischargeable.

EMERGING ISSUES (cont.)

□ SCOPE OF DISCOVERY

- What showing Necessary to obtain discovery regarding other aggrieved employees
 - Preliminary showing that Plaintiff was subjected to the violations of the Labor Code. And secondary showing that employment practices are uniform throughout the company needed to outweigh the privacy interests of other aggrieved employees and support discovery of their names and addresses. Williams v. Superior Court, 236 Cal. App. 4th 1151, **review granted.**
- Consider “redacted” discovery re other aggrieved employees

CASES

Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157

PAGA penalties imposed on a pay period by pay period basis, subject to reduction by trial court. PAGA claims are retroactive to violations that occurred prior to enactment, and amendment relates back to the date of filing. PAGA penalties are mandatory, but subject to reduction at the discretion of the court, mere evidence of good faith does not compel the court to exercise that discretion. Increased penalty for “subsequent violation” only triggered after employer has notice that the activity is a violation

Arias v. Superior Court, (2009) 46 Cal. 4th 969

PAGA claims are representative and need not be brought as a class action
Nonparty employees as well as the government are bound by the judgment with respect to civil penalties in an action brought under PAGA

Baumann v. Chase Inv. Servs. Corp.(9th Cir. 2014) 747 F.3d 1117 CAFA threshold not met by aggregating PAGA claims.

Currie-White v. Blockbuster, Inc., (2009)2009 U.S. Dist. LEXIS 68438

PAGA claim may be used to enforce seat provisions of wage orders through LC 1198; PAGA not an unconstitutional delegation of authority

Caliber Bodyworks v. Superior Court (2005) 134 Cal. App. 4th 365

Plaintiffs may seek only “civil” penalties under PAGA, not statutory penalties, and PAGA is the only mechanism for enforcing such penalties. See also *Dunlap v. Superior Court*, 142 Cal. App. 4th 330

Doe v. D.M. Camp & Sons (2009, ED Cal) 2009 US Dist LEXIS 33513

PAGA claims may be brought in U.S. District Court notwithstanding language requiring approval of settlements by Superior Court

CASES

Elder v. Schwan Food Co. (2011) 2011 Cal. App. Unpub. Lexis 3544

Tolling effect of separate class action, penalties under LC section 558 mandatory, 998 offer.

Franco v. Athens Disposal Co., Inc. (2009) 171 Cal. App. 4th 1277

Arbitration agreement prohibiting employee from acting as a private attorney general
unconscionable

Kurian v. United States Mortg. Capital, 2008 Cal. App. Unpub. LEXIS 6525

Strictly construes the notice and exhaustion provisions of PAGA

Harrington v. Payroll Entertainment Services, Inc. (2008) 160 Cal. App. 4th 589, 594

Award of “reasonable” attorneys fees a matter of right under PAGA, LC 2699(g)

HOME DEPOT U.S.A., INC. V. SUPERIOR COURT (2011), 191 Cal. App. 4th 210

Claim under PAGA based on failure to provide seating to its employees pursuant to *section 1198*
and IWC order states a claim under PAGA.

Iskanian v. CLS Transportation Los Angeles (2014) LLC, 59 Cal. 4th 348 Cannot waive
representative PAGA claims through arbitration agreement.

Lu v. Hawaiian Gardens Casino, Inc., 50 Cal. 4th 592

No private right of action to enforce tip pooling prohibition, PAGA action may be preserved.

Mendez v. Tween Brands, Inc. (2010) 2010 U.S. Dist. LEXIS 66454

PAGA representative claims may be brought in federal court without Rule 23 class allegations

CASES

Montano v. Wet Seal Retail, Inc , 2015 Cal. App. LEXIS 8, January 7, 2015, Opinion Filed, As modified Jan. 13, 2015., Modified by *Montano v. Wet Seal Retail, Inc.*, 2015 Cal. App. LEXIS 29 (Cal. App. 2d Dist., Jan. 13, 2015) non-severability clause in arbitration agreement applied to take all causes out of arbitration based on unenforceability of PAGA waiver

Reynolds v. Bement (2006) 36 Cal. 4th 1075

Moreno concurrence: PAGA provides a basis for officers liability and recovery of restitution by alleging a violation of LC 558

McKenzie v. Fed. Express Corp., (2011, CD CA) 765 F. Supp. 2d 1222 cannot use PAGA to enforce records requirements provisions of Wage Orders through 1198,

Nordstrom Com. Cases (2010) 186 Cal. App. 4th 576

Not an abuse of discretion to approve a settlement of a case including PAGA claims that allocates \$0 to those claims

Price v. Starbucks Corp., (2011) 192 Cal. App. 4th 1136

PAGA claim based upon the failure to timely pay employees upon discharge due to failure to pay reporting time pay. Because the underlying causes of action for reporting time pay fail, the PAGA claims also fail. Note, does not address PAGA claim for penalties under LC 226.3, which do not require a showing of injury.

CASES

Thomas v. Home Depot USA, Inc. (2007, ND Cal) 2007 US Dist LEXIS 75489

One year statute of limitations applies to PAGA penalties

Thurman v. Bayshore Transit Management, Inc. (2012) 203 Cal. App. 4th 1112 – meal and rest period unpaid wage amounts can be recovered in PAGA action enforcing LC Code sec. 558 penalties.

Urbino v. Orkin Services of California, Inc., 726 F.3d 1118 (9th Cir. 2013) PAGA claims not aggregated to establish federal jurisdictional amount (employees have a host of claims available to them and the rights are held individually, therefore they cannot be aggregated). Also, Urbino held that if you consider the state to be the primary beneficiary, there is no diversity because the state is not a “citizen” for diversity purposes.

Villacres v. Abm Industries Inc. (2011) 189 Cal. App. 4th Review denied by Villacres (Carlos) v. ABM Industries, Inc., 2011 Cal. LEXIS 1473 (Cal., Feb. 16, 2011)

A court-approved settlement in a prior suit precludes subsequent litigation on the same cause of action. Res judicata bars not only issues that were raised in the prior suit but related issues that could have been raised including the PAGA cause of action that encompassed violations that occurred within the settlement period covered by the class action.

Williams v. Superior Court (2015) 236 Cal. App. 4th 1151, depublished decision, CA Supreme Court review granted. Discovery of contact information regarding other aggrieved employees limited to store at which Plaintiff was employed, after a Belair-West notice, further discovery of other aggrieved employees at other locations conditioned on Plaintiff being deposed and making a further showing of support for own claims.

FIND THE PAGA PENALTY

MINIMUM WAGE VIOLATION

1194
OR 1197

PENALTY: 1194.2
OR 1197.1 OR 558?

OVERTIME VIOLATION

1194
OR 1198

PENALTY: 558 OR
OR 2699(f)

REST PERIOD VIOLATION

226.7 OR 558

PENALTY: 226.7(c)
OR 558
OR 2699(f)

MEAL PERIOD VIOLATION FARMWORKER

226.7 512 OR 558

PENALTY: 226.7
OR 558
OR 2699(f)

WAGE STUB VIOLATIONS

226
OR 558

#NELA16 961

PENALTY: 226(e)
226.3

Advanced PAGA Issues
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016

The Private Attorneys General Act of 2004 (PAGA) Most of the Questions, Some of the Answers

By Michael D. Singer
Cohelan Khoury & Singer
605 C Street
Suite 200
San Diego, CA 92101
(619) 595-3001
msinger@ckslaw.com

What does “PAGA” mean and why was it enacted?

PAGA is the acronym for the Private Attorneys General Act of 2004 codified in California Labor Code sections 2698, et seq.¹ This law deputizes employees suffering labor code violations in the workplace to act on behalf of the State of California to bring representative lawsuits on behalf of their workforce to recover “civil penalties” that previously were recoverable solely by the Labor Commissioner. With arbitration-clause collective-action waivers effectively contracting class action practice, PAGA actions have emerged as an effective vehicle for groups of employees to obtain relief for labor violations and as an efficient enforcement tool for workplace compliance.

In addition to exposure to misdemeanor criminal penalties for certain offenses, employer non-compliance with wage and hour laws² gives rise to three

¹ All section references are to the Labor Code unless otherwise specified.

² California employers’ workplace obligations relating to wages, hours, and working conditions arise under the California Labor Code and Industrial Welfare Commission (IWC) Wage Orders (Title 8, Cal. Code Regs. §§ 11000, et seq.). The IWC has promulgated 18 wage orders, of which 16 cover specific industries and occupations, one covers all employees not covered by an industry or occupation order, and a general minimum wage order amends all others to conform to the amount of the minimum wage currently set by statute.

types of monetary liability: (1) unpaid wage compensation; (2) statutory penalties; and (3) civil penalties. Certain statutes and regulations provide for recovery of wages, others contain provisions for statutory penalties to employees, and others provide for civil penalties, either independently or in addition to what a court may award an individual employee on a wage claim. Before PAGA's enactment, employees had no private right of action to recover civil penalties, which was the exclusive dominion of the Labor Commissioner. Recovery by the Labor Commissioner was paid into the state's general fund or into a fund created by the Labor Workforce Development Agency (LWDA) to educate employers. Such actions were, by nature, limited by staffing levels of labor law enforcement agencies, such as the Division of Labor Standards Enforcement (DLSE).

The legislature enacted PAGA to address the dual problems of unenforced labor statutes punishable only as criminal misdemeanors, with no civil penalty or other sanction included, and inadequate government resources to pursue enforcement of violations warranting civil penalties. PAGA provides for aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code and Wage Order violations personally and on behalf of other current or former employees.³ Of the civil penalties recovered, 75 percent is paid to the LWDA, and the remaining 25 percent goes to the "aggrieved employees," with any wages collected as a civil penalty paid 100 percent to the employee. In the first ten years of PAGA's operation, employers paid some \$31,000,000 in penalties to the LWDA.⁴ Employees, but not employers, may recover fees and costs in successful PAGA actions. The LWDA reports it currently receives some 6,000 PAGA notices per year.

What is an example of a civil penalty?

Many Labor Code provisions specifically provide for a civil penalty, typically assessed per employee for each pay period. For example, Labor Code section 558 states that an employer who violates any provision in that chapter or any provision of an IWC wage order is subject to a "civil penalty" of \$50 for each underpaid employee for each pay period, plus an amount sufficient to recover

³ Section 2699(a).

⁴ <http://celavoice.org/2014/09/19/california-has-collected-31-million-under-the-private-attorneys-general-act/> (Christian Schreiber).

underpaid wages, and \$100 per employee per pay period, plus underpaid wages, for subsequent violations.

What Labor Code claims trigger these civil penalties?

With certain exceptions, all Labor Code and IWC wage order provisions trigger civil penalties. Wage Order and other workplace posting, notice, or filing requirements, aside from mandatory payroll and workplace injury reporting, are exempted from PAGA.⁵ The penalty is that specifically provided in the statute or regulation, or if none, the general penalty provided in PAGA (one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation).⁶

Do I need to exhaust any prerequisites before suing under PAGA?

Yes, PAGA requires an employee to give written notice of Labor Code violations to both the employer and the LWDA, typically accomplished by certified mail. The notice required differs depending on which of the three types of civil penalties are covered by PAGA. As to violations of Labor Code provisions identified in 2699.5,⁷ Section 2699.3 requires an employee to give written notice of Labor Code violations to both the employer and the LWDA. The letter must specifically describe the facts and theories supporting the violations. If the agency notifies the employee and the employer that it does not intend to investigate, or if the agency fails to respond within 33 days, the employee may then bring a civil

⁵ Section 2699(g)(2).

⁶ Section 2699(f)(2).

⁷ Section 2699.5 states: The provisions of subdivision (a) of Section 2699.3 apply to any alleged violation of the following provisions: subdivision (k) of Section 96, Sections 98.6, 201, 201.3, 201.5, 201.7, 202, 203, 203.1, 203.5, 204, 204a, 204b, 204.1, 204.2, 205, 205.5, 206, 206.5, 208, 209, and 212, subdivision (d) of Section 213, Sections 221, 222, 222.5, 223, and 224, paragraphs (1) to (5), inclusive, (7), and (9) of subdivision (a) of Section 226, Sections 226.7, 227, 227.3, 230, 230.1, 230.2, 230.3, 230.4, 230.7, 230.8, and 231, subdivision (c) of Section 232, subdivision (c) of Section 232.5, Sections 233, 234, 351, 353, and 403, subdivision (b) of Section 404, Sections 432.2, 432.5, 432.7, 435, 450, 510, 511, 512, 513, 551, 552, 601, 602, 603, 604, 750, 751.8, 800, 850, 851, 851.5, 852, 921, 922, 923, 970, 973, 976, 1021, 1021.5, 1025, 1026, 1101, 1102, 1102.5, and 1153, subdivisions (c) and (d) of Section 1174, Sections 1194, 1197, 1197.1, 1197.5, and 1198, subdivision (b) of Section 1198.3, Sections 1199, 1199.5, 1290, 1292, 1293, 1293.1, 1294, 1294.1, 1294.5, 1296, 1297, 1298, 1301, 1308, 1308.1, 1308.7, 1309, 1309.5, 1391, 1391.1, 1391.2, 1392, 1683, and 1695, subdivision (a) of Section 1695.5, Sections 1695.55, 1695.6, 1695.7, 1695.8, 1695.9, 1696, 1696.5, 1696.6, 1697.1, 1700.25, 1700.26, 1700.31, 1700.32, 1700.40, and 1700.47, Sections 1735, 1771, 1774, 1776, 1777.5, 1811, 1815, 2651, and 2673, subdivision (a) of Section 2673.1, Sections 2695.2, 2800, 2801, 2802, 2806, and 2810, subdivision (b) of Section 2929, and Sections 3095, 6310, 6311, and 6399.7.

action against the employer. If the agency decides to investigate, it then has 120 days to do so. If the agency decides not to issue a citation, or does not issue a citation within 158 days after the postmark date of the employee's notice, the employee may commence a civil action.⁸ An employee may amend any existing complaint as of right within 60 days of gaining the ability to seek civil penalties.

The second type of PAGA civil penalty is for Health and Safety violations related to safety rather than wage and hour violations.⁹ Following notice, the DLSE inspects or investigates and determines whether to issue a citation. If it does, the employee cannot commence a PAGA action. If the division does not issue a citation, the employee can challenge that determination in superior court.¹⁰

The third class of civil penalties under PAGA concerns Labor Code violations not listed in Section 2699.5 or health and safety violations in Sections 6300, et seq. Employees can file suit after providing notice to the employer and the LWDA and has not received notice from the employer within 33 days that the alleged violations are cured.¹¹

Can I name any individuals as defendants in addition to the company in a PAGA complaint?

Yes. PAGA employees can recover all civil penalties under Section 558 from “any person acting on behalf of an employer who violates, or causes to be violated [any of the provisions set forth in Sections 500-558] or any provision regulating hours and days of work in any IWC Wage Order. An individual officer, director or owner of a business meeting these requirements may be personally liable for a PAGA claim.”¹²

What detail needs to go in my PAGA letter?

PAGA states the aggrieved employee or must give written notice by certified mail to the Labor and Workforce Development Agency and the employer of “the

⁸ Section 2699.3(a)(2)(A), (B).

⁹ Section 6300, et seq.

¹⁰ Section 2699.3(b).

¹¹ Section 2699.3(c)(2)(A).

¹² See, e.g., *Sarmiento v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 51159, (C.D. Cal. 2015); *Hoang v. Vinh Phat Supermarket, Inc.*, 2013 U.S. Dist. LEXIS 114475 (C.D. Cal. 2013); *Velasquez v. HMS Host USA, Inc.*, 2015 U.S. Dist. LEXIS 51159 (E.D. Cal. Dec. 5, 2012); *Helm v. Alderwoods Grp., Inc.*, 696 F. Supp. 2d 1057, 1074 (N.D. Cal. 2009).

specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.”¹³ The purpose is to adequately put the LWDA on notice of those alleged violations listed in Section 2699.5 so it can determine whether to launch an investigation. For violations outside Section 2699.5, the purpose of the notice is to provide the employer 33 days to cure the violations.

The Ninth Circuit Court of Appeals set forth the detail necessary for a Section 2699.3 PAGA letter. Simply listing the statutes allegedly violated with a cursory description of their subject matter in a “string of legal conclusions with no factual allegations or theories of liability to support them” is insufficient. Instead, the PAGA requires a detailed statement of the facts and theories to support the allegations.¹⁴ One court has held PAGA “requires an exceedingly detailed level of specificity.”¹⁵ Courts are not hesitant to dismiss PAGA claims based on deficient notice.¹⁶ Amendment of the PAGA notice to cure deficiencies has not been permitted, though there would be no basis to prohibit a second effort from an employee with claims within the one-year statute of limitations.¹⁷

Attaching a copy of a draft complaint is helpful. The court may not dismiss a complaint for non-material differences in the articulation of facts and theories between the notice and the complaint.¹⁸

Are there any PAGA claims that do not require a PAGA letter?

No.

What are the time requirements and statutes of limitations ramification with regard to the service of a PAGA notice letter?

The statute of limitations for recovery of a civil penalty is one year.¹⁹ The 33-day period permitted for the LWDA to determine whether to investigate is

¹³ Section 2699(e)(2).

¹⁴ *Alcantar v Hobart Serv.*, 800 F.3d 1047, 1057 (9th Cir. 2015)

¹⁵ *Soto v. Castlerock Farming & Transp. Inc.*, 2012 U.S. Dist. LEXIS 53109 (E.D. Cal. 2012)

¹⁶ See, e.g., *Avilez v Pinkerton Government Services*, 2015 U.S. Dist. LEXIS 172700 (C.D. Cal. 2015); *Ovieda v. Sodexo Operations, LLC*, 2013 U.S. Dist. LEXIS 99293 (C.D. Cal. 2013)

¹⁷ *Avilez v Pinkerton Government Services*, 2015 U.S. Dist. LEXIS 172700 at 58

¹⁸ Section 2699.3(b)(2)(A)(4)

¹⁹ Cal. Code Civ. Proc. § 340(a).

added to the penalty statute of limitations.²⁰ The 120 days the LWDA is afforded to issue a citation and the 158 days after notice of intent to investigate within which it must notify the representative plaintiff it does not intend to issue a citation are also added to the limitations period. The additional time does not toll the statute. Because the 33-day and 158-day periods are not counted as part of the statute of limitations, the statute continues to run for each day that suit is not filed after the 33-day period elapses or the LWDA notifies the representative plaintiff of its intent to investigate, or after the 158-day period elapses after notification of intent to investigate or the LWDA notifies the representative plaintiff that no citation will be issued. These days would be deleted from the recovery period.

A party may amend a complaint as a matter of right within 60 days of the time periods for compliance with notice procedures.²¹ After 60 days, leave of court is required.

Can an employer cure violations prior to my suit being filed and absolve itself of liability for the PAGA penalties?

Employers have 33 days following receipt of notice to cure violations by paying all civil penalties owed during the extended limitations period. For cases filed on or after October 2, 2015, employers may also cure certain wage statement violations.²² The cure provisions for wage statements apply only to violations of Section 226(a)(6)—which requires employers to specify the inclusive dates of the period for which the employee is paid—and section 226(a)(8) —which requires employers to state the name and address of the “legal entity” that is the employer. A violation of these wage statement violations is cured only if the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice.²³ Employers may not avail themselves of the notice and cure provisions for these two Section 226 violations more than once in a 12-month period for the same violations, regardless of the location of the worksite.²⁴

²⁰ Section 2699.3(a)(2)(A).

²¹ Section 2699.3(a)(2)(C).

²² AB 1506, enacted October 2, 2015 and effective immediately.

²³ Section 2699(d).

²⁴ 2699.3(c)(2)(B)(ii).

Can an employee “opt out” of a PAGA case?

There is no provision in PAGA for an aggrieved employee to decline inclusion in a judgment or settlement.

What is the res judicata effect of a PAGA judgment or a settlement and release?

A PAGA judgment operates as res judicata foreclosing subsequent actions for civil penalties on the same claims. A judgment in a PAGA action binds all those who would be bound by a judgment in an action brought by the government, including nonparty aggrieved employees.”²⁵

A civil penalty judgment for aggrieved employees in a PAGA action requires proof of underlying Labor Code violations. Consequently, it carries preclusive effect enabling the employees to invoke collateral estoppel to obtain remedies other than civil penalties for those Labor Code violations.²⁶ If an employer prevails, however, there is no preclusive effect on employee non-parties with regard to remedies other than civil penalties due to the absence of notice and opportunity to be heard.²⁷ Unlike a class action, a judgment or dismissal with prejudice in favor of an employer in a representative PAGA action is not binding on non-party employees with regard to remedies other than civil penalties.

Depending on the terms of the release involved, PAGA claims that were or could have been raised in a prior settled proceeding based on the facts and circumstances alleged could be barred by res judicata from subsequent litigation.²⁸

Are provisions requiring arbitration of all workplace disputes and purporting to forbid class and PAGA claims under the Federal Arbitration Act enforceable?

Mostly not. It is clear that arbitration clauses purporting to require employees to waive their right to prosecute PAGA representative claims are “contrary to public policy and unenforceable as a matter of state law.”²⁹ In cases

²⁵ *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009).

²⁶ *Id.* at 987.

²⁷ *Id.*

²⁸ *Villacres v. ABM Industries Inc.*, 189 Cal.App.4th 562, 584 (2010).

²⁹ *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 382 (2014); *cert. denied*, *CLS Transp. L.A., LLC v. Iskanian*, 135 S. Ct. 1155 (U.S. 2015); see, also, *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th

only alleging PAGA claims, courts may not stay the representative claim and order an “individual” PAGA claim to arbitration.³⁰ However, the California Supreme Court has left open the possibility that parties may contract to arbitrate PAGA representative claims.³¹ The Court did not address how claims settled in arbitration fit into PAGA’s scheme requiring court approval of penalty settlements. Arguably it is therefore permissible for parties to stipulate to dismiss PAGA claims stayed in superior court pending individual arbitration of Labor Code claims pursuant to a class arbitration waiver and resolve those claims under the auspices of arbitration. However, parties may wish to ensure the validity of a settlement of included penalty claims by seeking superior court approval, per PAGA.

Though a pure PAGA case cannot be removed under CAFA, hybrid class and PAGA actions may satisfy CAFA jurisdictional limits. Thus, a defendant that has imposed an arbitration clause with a waiver of class and representative claims can initiate bifurcated proceedings to enforce the arbitration provisions as to the PAGA claimant’s individual labor code claims and also proceed with the representative action. Courts typically stay the representative action until arbitration of the individual action is complete.

Can I assert claims for civil penalties in addition to a statute that provides for statutory penalties?

Yes. PAGA specifically provides that its remedy is awarded in addition to all other remedies available under state or federal law.³² Civil penalties are those recoverable under PAGA and are awardable in addition to statutory penalties paid directly to the employee.³³ One court has found PAGA penalties available in addition to underpaid denied meal and rest period premiums under Section 226.7.³⁴

Cir. 2015) (reversing federal district court decision that the Federal Arbitration Act preempts state rules barring waiver of PAGA claims).

³⁰ *Williams v. Superior Court*, 237 Cal.App.4th 642, 645, 649 (2015) (“[A] PAGA claim is not an individual claim”).

³¹ *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 391 (2014) (“CLS must answer the representative PAGA claims in some forum. The arbitration agreement gives us no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration”).

³² Section 2699(g)(1).

³³ *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal.App.4th 365, 377 (2005); *cf. Guifi Li v. A Perfect Day Franchise, Inc.*, 2012 U.S. Dist. LEXIS 83677 (2012) (refusing to award civil penalties in addition to statutory penalties for wage statement violations under Section 226).

³⁴ *In re Taco Bell Wage and Hour Actions*, 2016 U.S. Dist. LEXIS 48557 (E.D. Cal. 2016) (Post-Trial Order Denying PAGA Penalties).

Can I make claims for multiple PAGA civil penalties in a case in which there are multiple labor code claims or am I entitled to only one penalty?

Yes. PAGA provides that “any” Labor Code provision giving rise to civil penalties may be recovered in a civil action brought by an aggrieved employee.³⁵ Complaints separating each PAGA claim into discrete causes of action enable parties to seek summary adjudication of the specific claims.

Do I need to prove “injury” as required under Section 226 to establish a PAGA claim for wage statement violations?

No. For recovery of PAGA civil penalties, as distinguished from Section 226 statutory penalties, employees are only required to prove violation of Section 226(a) and are not required to establish injury.³⁶

Do I need to prove injury to the represented aggrieved employees to prove the claim?

Undecided. There is nothing in PAGA that requires proof of the claim of every worker affected by an employer’s non-compliant practice. Employers continue to press this argument on the basis that PAGA provides for recovery by “aggrieved employees.”³⁷ As a practical matter, the Court will award penalties to those for whom it finds representative proof applicable.

Can the defendant remove my pure PAGA claim?

No, unless the defendant is a foreign corporation and the representative’s individual non-penalty recovery would exceed the \$75,000 jurisdictional minimum for diversity jurisdiction. The Ninth Circuit has found there is no federal diversity jurisdiction for PAGA claims aggregated to meet the \$75,000 minimum requirement on the basis that the state is not a “person” for diversity purposes.³⁸

³⁵ Section 2699(a).

³⁶ *McKenzie v. Fed. Exp. Corp.*, 765 F. Supp. 2d 1222, 1232 (C.D. Cal. 2011); *Wilner v Manpower, Inc.* 2014 U.S. Dist. LEXIS 44848 at 47 (N.D. Cal. 2014).

³⁷ Section 2699(g)(1).

³⁸ *Urbino v. Orkin Services*, 726 F.3d 1118, 1123 (9th Cir. 2013).

There is also no federal jurisdiction for PAGA claims under the Class Action Fairness Act (CAFA), conferring federal jurisdiction for class claims in excess of \$5,000,000 between diverse parties.³⁹

Can the defendant remove my PAGA claim if it is pled with non-PAGA claims, and if so, can the employer aggregate my PAGA claims to reach the jurisdictional minimums for diversity individually or under CAFA?

Federal jurisdiction exists under CAFA permitting removal to federal court for class actions combined with PAGA claims providing the defendant is a foreign corporation and claims reach \$5,000,000. The PAGA claims may not be aggregated with class claims to reach the jurisdictional minimums.⁴⁰

Can I bring or resolve an individual PAGA case?

Probably not, but there is no California appellate authority directly on point. The California Supreme Court declined to decide whether PAGA authorizes purely individual claims.⁴¹ One unpublished decision in 2013 affirmed a trial court award of individual PAGA civil penalties.⁴²

Courts have observed that PAGA creates only a representative right of action and applies only to employee suits brought in a representative capacity.⁴³ “[T]he aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties.”⁴⁴

In an unpublished decision, the Ninth Circuit Court of Appeals ruled definitively that PAGA does not support individual claims. Reversing an individual

³⁹ *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1119 (9th Cir. Cal. 2014).

⁴⁰ *Yocupicio v. PAE Grp., LLC*, 795 F.3d 1057 (9th Cir. 2015)

⁴¹ *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 384 (2014).

⁴² *Elder v. Schwan Food Co.*, 2013 Cal. App. Unpub. LEXIS 1472 (2013).

⁴³ See, e.g., *Reyes v. Macy's, Inc.*, 202 Cal.App.4th 1119, 1123 (2011) (holding that a PAGA claim did not fall within the scope of an arbitration clause requiring arbitration of all “individual” claims because, as a matter of law, a “plaintiff may not . . . bring the PAGA claim as an individual claim”); *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F.Supp.3d 1070, 1088 (E.D. Cal. 2014) (“[O]nly representative PAGA actions fulfill the purpose of the statute [referring to the PAGA].”); *Monaghan v. Telecom Italia Sparkle of N. Am.*, ___ Fed.Appx. ___, 2016 U.S. App. LEXIS 6232 at 16 (9th Cir. 2016) (noting lack of California appellate authority and finding PAGA fee shifting provision applicable solely to representative claims); see, also, *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 449 (9th Cir. 2015) (noting that the existence of individual PAGA claims is disputed).

⁴⁴ *Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.*, 46 Cal.4th 993, 1003 (2009).

award of attorney's fees under PAGA, the Court declared that "PAGA applies only to employee suits brought in a representative capacity."⁴⁵

If I bring a class claim with PAGA allegations that the Defendant removes to federal court under individual diversity grounds or the Class Action Fairness Act and the Court denies class certification, can I remand the case to State court for the remaining pure PAGA claims?

No. A "putative class action, once properly removed, stays removed."⁴⁶

Can I bring two separate lawsuits, one for PAGA and one for class claims with the same plaintiff? Why would I want to do that?

Yes. An employee can bring two separate cases, one as the class representative for labor code claims and one as the representative plaintiff for PAGA claims.⁴⁷ This is an exception to the general rule against claim splitting, requiring a plaintiff to bring all claims arising under the same factual predicate in a single action. PAGA specifically states employees can recover other remedies provided under state and federal law, such as wages, "either separately or concurrently" with a PAGA action.⁴⁸

Do I get the higher penalty for every violation after the first one or is there some other requirement to meet before the higher penalty for "subsequent" violations kicks in?

Undecided. No reported appellate decision squarely addresses when the increased PAGA penalty applies. There is some authority analyzing statutory penalties finding that higher penalty assessments are warranted only to repeat offenders after an initial penalty citation, or after an employer otherwise on actual notice of the alleged violations.⁴⁹ Federal cases had followed this authority in

⁴⁵ *Monaghan v. Telecom Italia Sparkle of N. Am.*, ___ Fed.Appx. ___, 2016 U.S. App. LEXIS 6232 at 14 (9th Cir. 2016); cf. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 387 "every PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state." (quoting concurring opinion by Chin, J. at 394).

⁴⁶ *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1091 (9th Cir. 2010).

⁴⁷ See, e.g., *Peck v Gordon Trucking, Inc.*, San Bernadino County Superior Court Case No. CIDVS147618 (overruling demurrer).

⁴⁸ Section 2699(g)(1).

⁴⁹ *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008).

calculating PAGA penalties on remand motions prior to Ninth Circuit decisions disallowing aggregation of PAGA penalties for reaching jurisdictional thresholds.⁵⁰ According to one court, “[t]he word ‘subsequent’ has a specific meaning under the California Labor Code.”⁵¹ “Until the employer has been notified that it is violating a Labor Code provision . . . the employer cannot be presumed to be aware that its continuing underpayment of employees is a ‘violation’ subject to penalties.” “However, after the employer has learned its conduct violates the Labor Code, the employer is on notice that any future violations will be punished just the same as violations that are willful or intentional—i.e., they will be punished at twice the rate of penalties that could have been imposed or that were imposed for the initial violation.”⁵² At least one federal court has rejected the notice requirement for increased statutory penalties in which proof of willful or intentional conduct is required.⁵³ Labor Commissioner citations for multiple violations are assessed at the initial violation penalty rate.⁵⁴

If PAGA representative plaintiffs sit in the shoes of the Labor Commissioner, and the Commissioner has three years to bring a citation, why are PAGA claims limited to one year?

Notwithstanding the one-year statute of limitations for penalty claims, the DLSE has three years to commence an action to collect a civil penalty, fee, or penalty fee from the date the penalty or fee becomes final.⁵⁵ This provision extends the time for the DLSE to obtain a judgment to enforce a final order for collection of penalties. It does not lengthen the time to initiate an enforcement action for penalties or create a three-year liability period.

⁵⁰ See, e.g., *Allen v. Utilquest, LLC*, 2013 U.S. Dist. LEXIS 108948 at 25-26 n.9 [“Courts have held that ‘subsequent’ violations in the PAGA context means not just later in time but following notice to the employer that it is in violation of the Labor Code”] (remand proceedings).

⁵¹ *Patel v. Nike Retail Servs.*, 58 F. Supp. 3d 1032, 1042 (N.D. Cal. 2014) (remand motion assessing value of statutory penalties for amount in controversy calculations).

⁵² *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008).

⁵³ *Carranza v. Nordstrom, Inc.*, 2014 U.S. Dist. LEXIS 172307 at 56-57 (C.D. Cal. 2014) (remand motion).

⁵⁴ See, e.g., *In the Matter of the Civil Penalties and Wage Assessments Against New Hope Community Care, Inc., et al.*, September 23, 2013 Findings and Orders on Citations, State Case No. 35-111983-318, Citation No. 0238987. Holding that individualized liability determinations make representative PAGA actions unmanageable, and therefore untenable, would impose a barrier on such actions that the state law enforcement agency does not face when it litigates those cases itself.

⁵⁵ Section 200.5.

Are wages recoverable to PAGA plaintiffs under Section 558 even though they are not “penalties?”

Yes. Unlike other statutes, Section 558 specifically defines the applicable civil penalty to include the dollar amount per pay period “in addition to” an amount sufficient to recover underpaid wages.⁵⁶ These wages are paid directly to the employees. Attorneys are using this provision as a mechanism to provide more than the 25% amount to the aggrieved employees by allocating a portion of the recovery to wages.

Can I get three years of wages under Section 558 since these are not penalties?

Undecided. The statute of limitations for recovery of wages is three years.⁵⁷ Though the statute of limitations for recovery of wages is extended to four years under the Unfair Competition Law (UCL), Business and Professions Code sections 172000, et seq., the Labor Commissioner cannot enforce the UCL, limiting wage recovery to three years. An argument can be made to support the proposition either that the recovery under Section 558 is a wage subject to a three-year statute of limitations or is a “penalty” subject to a one-year limitations period⁵⁸. The policy of the Labor Commissioner is to assess three years of wages as part of the civil penalty under Section 558.⁵⁹ No published California addresses the period of recovery. Multiple federal district court decisions have applied a one-year limitations period to Section 558 wage claims.⁶⁰ However, PAGA describes the remedy available as a “civil penalty,” and penalties are governed by a one-year statute of limitations.

⁵⁶ *Thurman v. Bayshore Transit Mgmt.*, 203 Cal.App.4th 1112, 1147 (2012).

⁵⁷ Cal. Code Civ. Proc. 338(a).

⁵⁸ Cal. Code Civ. Proc. 340(a).

⁵⁹ See, e.g., *In the Matter of the Civil Penalty Citations Against Bedford Care Group, et al.*, December 12, 2014 DIR Findings and Order, State Case No. 35-114602-2206; *In the Matter of the Civil Penalties and Wage Assessments Against New Hope Community Care, Inc. et al.*, September 23, 2013 Findings and Orders on Citations, State Case No. 35-111983-318; *In the Matter of the Complaint of the Penalty Assessment against Hsians Group, et al.*, November 5, 2012 Findings and Order on Penalty Assessment 021068, State Case No. 25-108675-B.

⁶⁰ See, e.g., *Hoang v. Vinh Phat Supermarket, Inc.*, 2013 U.S. Dist. LEXIS 114475 (E.D. Cal. 2013); *Yadira v. Fernandez*, 2011 U.S. Dist. LEXIS 62894 (N.D. Cal. 2011)

Does 558 wage recovery constitute “victim-specific” relief under Iskanian that would not qualify for exemption from Federal Arbitration Act and would therefore be subject to an arbitration clause and representative action waiver?

Probably not. *Iskanian* stated that its decision would not permit a governmental agency to circumvent the FAA by deputizing an employee to bring a suit for individual damages, tantamount to a class action.⁶¹ But a PAGA action for underpaid wages under Section 558 remains an action brought by an employee on behalf of the government, which is not a party to an arbitration agreement between the employer and employee. The *Iskanian* rule prohibiting waiver of this type of action through an arbitration clause would bar an effective waiver of wage recovery through enforcement of a representative action waiver.⁶²

Does the Section 226.3 wage statement penalties of \$250/\$1000 apply to all wage statement violations or just for failing to provide any wage statement or keeping records?

Undecided. It can be argued that the language of Section 226.3 indicates the higher penalties in Section 226.3 apply only if the employer completely fails to provide wage statements or maintain the information Section 226(a) requires.⁶³ However, the Labor Commissioner applies the higher civil penalty provision in Section 226.3, not the default PAGA civil penalty.⁶⁴

Are separate PAGA penalties available for meal period violations under both Labor Code Section 226.7 and Labor Code Section 512?

One case has held that separate PAGA penalties for meal period violations under Section 512, outlining meal period requirements, and Section 226.7, providing the hour of pay remedy for meal period violations, based on the same violation is consistent with the language of PAGA and its legislative intent.⁶⁵

⁶¹ *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 387 (2014).

⁶² See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)

⁶³ Section 226.3 establishes a penalty as to pay periods “for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226.”

⁶⁴ *In the Matter of the Civil Penalties and Wage Assessments Against New Hope Community Care, Inc., et al.*, September 23, 2013 Findings and Orders on Citations, State Case No. 35-111983-318, Citation No. 0238987.

⁶⁵ *Wert v US Bancorp*, 2016 U.S. Dist. LEXIS 37302 (S.D. Cal. 2016).

Do PAGA actions toll the statute of limitations for individuals like class actions do?

Undecided, but likely not. The absence of class action notice and opt-out procedure binding non-parties and the nature of the claim as a quasi qui tam action on behalf of the government separate PAGA claims from those in which non-parties' rights are being actively litigated sufficient to toll their statutes of limitations.

Are enhancements available to lead plaintiffs?

Unknown. Enhancement or service payments to lead plaintiffs are not provided in PAGA. They are a common law creation for class actions and can be argued for on that basis. Courts have approved PAGA settlements both providing a service payment for the representative plaintiff or settling separately with the plaintiff in exchange for a full waiver of all potential claims.

Do I get attorney's fees under the statute? Are they percentage of the fund or hourly and do I get a lodestar multiplier?

PAGA provides for attorney's fees for prevailing employees (a one-way fee-shifting statute).⁶⁶ No court has addressed the application of class action concepts to award fees as a percentage of the fund or provide a lodestar multiplier. Similar theories supporting class action enhanced fee awards such as difficulty of the questions involved and the skill in presenting them, the contingent nature of the fee award, the extent to which the litigation precluded other employment, and the percentage-of-the-fund the attorney would have received on the fair market may apply.⁶⁷

Do I need to satisfy class certification requirements in order to maintain a PAGA representative action?

No, provided the PAGA claim is not brought as a class action. The California Supreme Court has held unequivocally that class certification requirements need not be met in representative PAGA actions.⁶⁸ Federal district

⁶⁶ Section 2699(g)(1).

⁶⁷ See *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 49 (2000).

⁶⁸ *Arias v. Superior Court*, 46 Cal. 4th 923, 926 (2009).

courts are divided on whether a PAGA claim brought in federal court must satisfy Rule 23 class certification requirements. Addressing the issue in reverse, the Ninth Circuit has declared there is no original federal jurisdiction under CAFA but left open the question whether a federal court may allow a PAGA action otherwise within its original jurisdiction to proceed under Rule 23 as a class action. Thus it may be that a federal court will entertain a PAGA action as a class action, though if it is pled as a representative action, Rule 23 elements need not be satisfied.⁶⁹

Does denial of class certification on predominance grounds mean I cannot maintain a PAGA action? Is there a manageability requirement for trying a PAGA case requiring plaintiff to prove trial is manageable to prove liability and damages as to every aggrieved employee?

It depends on the claims. Courts are more inclined to certify class cases based on objective evidence, such as that found in time records or employee manuals and handbooks, and proof of similar PAGA claims presents few if any individualized challenges to establishing liability. Individualized liability and determinations are not an impediment to proving a PAGA action on manageability grounds because the state faces no such barrier in its enforcement proceedings.⁷⁰ “Imposing such a requirement, found nowhere in PAGA itself and apparently not imposed upon the government, would ‘obliterate [the] purpose’ of representative PAGA actions.”⁷¹ Nevertheless, multiple federal district court cases have dismissed PAGA claims based on manageability concerns following denial of class certification on the basis of predominating individual issues, such as in overtime exemption misclassification overtime actions, off-the-clock cases, and denied meal and rest period claims.⁷² Because class action predominance of common questions

⁶⁹ *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1124 (9th Cir. 2014); *Ortiz v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 36833 (N.D. Cal. 2014).

⁷⁰ *Zacharia v. Wal-Mart Stores, Inc.*, 2015 U.S. Dist. LEXIS 151351 at 22 (C.D. Cal. 2015).

⁷¹ *Id.* citing *Plaisted v. Dress Barn, Inc.*, 2012 U.S. Dist. LEXIS 135599 (C.D. Cal. 2012); see, also, *Nelson v. Southern Cal. Gas Co.*, 2013 Cal.App.Unpub. LEXIS 3837 (2d Dist. 2013) (“A conclusion, made in the context of a class certification motion, that individual questions would predominate in companywide class litigation, thereby rendering class action treatment inappropriate, is not the same as a conclusion that the plaintiffs cannot establish there are other ‘aggrieved persons’ they may properly represent in a PAGA claim.”); cf. *Dailey v. Sears, Roebuck & Co.*, 214 Cal.App.4th 974, n.13 (2013) (affirming order denying class certification of overtime misclassification claims on manageability grounds and dismissing PAGA claim).

⁷² See, e.g., *Ortiz v. CVS Caremark Corp.*, 2014 U.S. Dist. LEXIS 36833 (N.D. Cal. 2014) (“[T]he circumstances of this case make the PAGA claim here unmanageable because a multitude of individualized assessments would be necessary”) (off-the-clock and expense reimbursement claims); *Bowers v. First Student, Inc.*, 2015 U.S. Dist. LEXIS 54238 (C.D. Cal. 2015) (off-the-clock claim); *Amey v. Cinemark USA, Inc.*, 2015 WL 2251504, at *1, *16 (N.D.

is not required in PAGA actions, plaintiffs who can formulate a trial plan cannot be prohibited from proceeding to represent aggrieved parties on PAGA claims.⁷³

Does the inclusion of a PAGA claim prohibit appealing denial of class certification?

Yes. The death-knell doctrine permitting direct appeal of class certification denials that effectively end the case does not apply where PAGA claims persist.⁷⁴

Are representative plaintiffs' fiduciaries of the absent aggrieved employees similar to class action representative plaintiffs?

Undecided. Black's⁷⁵ defines a "fiduciary" as:

[a] person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires ... [a] person having [a] duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking...a person having duties involving good faith, trust, special confidence, and candor towards another.

The most basic duty of a fiduciary is the duty of loyalty, which obligates the fiduciary to put the interests of the beneficiary first, ahead of the fiduciary's self-interest, and to refrain from exploiting the relationship for the fiduciary's personal benefit.⁷⁶

By definition, a "representative" plaintiff acts on behalf of a group of individuals for the group benefit. The question is whether a PAGA representative acts primarily for him or herself or for another's benefit, in this case the State of California and the represented aggrieved workers. Since the law

Cal. May 13, 2015) ("[W]hen the evidence shows, as it does here, that numerous individualized determinations would be necessary to determine whether any class member has been injured by Cinemark's conduct, then allowing a [PAGA] representative action to proceed is inappropriate."); *Litty v. Merrill Lynch & Co., Inc.*, 2014 WL 5904904, at *3 (C.D. Cal. Nov. 10, 2014) (striking PAGA allegations; "The circumstances of this case make the PAGA claim unmanageable because a multitude of individualized assessments would be necessary.").

⁷³ *Rix v. Lockheed Martin Corporation*, 2012 U.S. Dist. Lexis 653 (S.D. Cal. 2012); *Nelson v. S. Cal. Gas Co.*, 2013 Cal.App.Unpub. LEXIS 3837 (2013).

⁷⁴ *Munoz v. Chipotle Mexican Grill, Inc.*, 238 Cal.App.4th 291, 294 (2015).

⁷⁵ <http://thelawdictionary.org/fiduciary/>; Black's Law Dictionary 625 (6th ed. 1990).

⁷⁶ Restatement (Third) of Agency § 8.01 (2006).

deputizes private employees to serve as attorneys general representing the government, the question is whether the government owes fiduciary obligations to the public for whose benefit the action is brought. The California Supreme Court has held that actions by the government for civil penalties are law enforcement actions designed to protect the public and not to benefit private parties. They are not the equivalent of class actions brought by private parties and do not require the same safeguards to protect a defendant from multiple suits. The role of the Attorney General or other governmental official suing for civil penalties is as a protector of the public, which may be inconsistent with the welfare of the class.⁷⁷ These principles cast doubt on a finding of fiduciary loyalty analogous to class representative status.

What happens if the defendant tries to buy off my client after the PAGA letter but before the case is filed?

Undecided. Some defense counsel are offering large individual settlements to prospective PAGA plaintiffs far in excess of their potential individual recovery during the 33-day time between service of the PAGA Notice and the right to file a representative action. It is the individual's choice whether to accept an inflated sum or to continue to act on behalf of the aggrieved workforce.

What happens if the defendant tries to buy off the PAGA representative plaintiff after the case is filed?

The Court will decide, as settlements of PAGA actions including penalties require court approval.⁷⁸ Similarly, the pendency of a PAGA representative action likely requires court approval of attempted out-of-court settlements of individual PAGA claims in so-called “*Pick-Up Stix*” settlements.⁷⁹ Courts in some counties are approving PAGA-only settlements on stipulation and order, with others requiring a noticed motion.

⁷⁷ *People v. Pacific Land Research Co.*, 20 Cal.3d 10, 24 (1977).

⁷⁸ Section 2699(l). The legislature is considering revisions to PAGA in the 2015-2016 legislative session enhancing judicial oversight of PAGA settlements by requiring review of PAGA claims that do not involve payment of penalties.

⁷⁹ *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796, 802 (2009) (individual settlements do not require court approval prior to class certification).

Can another representative plaintiff file the same case as mine after I do but before my case is resolved?

Undecided. However, *Iskanian* characterized PAGA actions as a form of qui tam whistleblower actions, which are subject to the “first to file” jurisdictional bar prohibiting successive plaintiffs from bringing copycat lawsuits⁸⁰.

If I settle the case and no penalties are part, do I need court approval?

No. PAGA only requires superior court approval of “penalties sought as part of a proposed settlement agreement” pursuant to PAGA.⁸¹

What about the new anti-PAGA legislation proposed?

The Governor has introduced legislation in the 2015-2016 session aimed at curtailing private litigation in favor of increased government enforcement and oversight. According to the Governor:

The Administration is committed to reducing necessary litigation and lowering the costs of doing business in California to support a thriving economic environment. Given the scope and frequency of PAGA filings, there is great opportunity to increase the rate of administrative handling of cases versus the courts. Reducing the litigation and increasing early resolution will improve outcomes for workers and reduce costs for employers.

The initial proposal had provided for agency evaluation and approval of PAGA settlements and established broad provisions for employer amnesty. Negotiations with employee advocates resulted in final compromise legislations. The administration will provide additional budgetary support for the DIR to fund 10 positions for the LWDA and revise PAGA as follows:

⁸⁰ *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 382 (2014) (“A PAGA representative action is therefore a type of qui tam action”); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 439 (9th Cir. 2015). The first-to-file rule in the California False Claims Act, authorizing private “qui tam” parties to assert claims on behalf of the government, is codified in Cal. Gov. Code § 12652(c)(2) [“When a person brings an action under this subdivision, no other person may bring a related action based on the facts underlying the pending action”]; see, also, *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.*, 109 Cal.App.4th 1668, 1679 (2003); [31 U.S.C.S. § 3730\(b\)\(5\)](#); *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1974 (2015).

⁸¹ Section 2699(l).

1. The LWDA will have an additional 30 days to determine whether to investigate a claim;
2. Complaints must be filed online;
3. All parties must pay \$75 for the first filing;
4. The LWDA will have the ability to request an additional 60 days for investigation;
5. Parties must file a notice of proposed settlement and the final settlement/judgment with the LWDA;
6. Judicial review is required for resolution of all PAGA-initiated cases (replacing provisions for review only of resolutions involving payment of penalties); and
7. Provides a five year sunset on the extension on the notice provisions.

Five additional bills limiting PAGA claims are under consideration for the 2015-2016 legislative session:

AB 2461 - Limits the scope of PAGA to apply only to Sections 226, 226.7, 510, and 512.

AB 2462 - Allows employers to cure any PAGA violations.

AB 2463 - Puts a cap on PAGA penalties (no more than one thousand dollars (\$1,000) for each aggrieved employee).

AB 2464 - Authorizes a court to dismiss an action as to an aggrieved employee seeking recovery of a civil penalty, if, after notice and hearing, the court finds that the aggrieved employee suffered no appreciable physical or economic harm.

AB 2465 - Requires the LWDA to investigate the alleged violation and determine if there is a reasonable basis for a civil action within 120 calendar days of the PAGA notice.

What discovery is permissible in PAGA cases? Will a judge order the defendant to produce contact information like in a class action?

Undecided, and the issue is currently on review the California Supreme Court. A lower court ruled that plaintiff needed first to show that “he himself was subjected to violations of the Labor Code.” After making that showing, the

plaintiff could then move forward to showing that the defendant's practices were "uniform throughout the company."⁸²

Some courts provided representative plaintiffs discovery of contact information for other potentially aggrieved employees on a limited basis, such as the location or locations where the plaintiff worked.⁸³

Has any court ever permitted the plaintiff himself to receive 25% of the PAGA penalties?

Yes. A single federal district court awarded 25% of a settlement to the representative plaintiff.⁸⁴ No court has followed this decision.

I settled a PAGA case and the defendant wants me to release all PAGA claims. Should I agree?

A release of claims beyond the scope of the allegations of the complaint is impermissible.⁸⁵ Practitioners should release only those claims that have been alleged and evaluated for settlement.

How is the amount of PAGA penalties given to the state allocated in a class action settlement that includes PAGA? Can the State object to the allocation?

Currently, attorneys prosecuting PAGA actions self-allocate the portion of any settlement apportioned to penalties, subject to court approval, rejection, or revision. PAGA contains no procedures for the State to object to the allocation. Several provisions are before the legislature for the 2015-2016 session addressing these concerns.

⁸² *Williams v. Superior Court (Marshalls)*, review granted, formerly reported at 236 Cal.App.4th 1151 (2015).

⁸³ *Currie-White v. Blockbuster, Inc.*, 2010 U.S. Dist. LEXIS 47071, at *9-11 (N.D. Cal. 2010) (PAGA seating action; court restricted discovery to two stores where plaintiff worked plus ten stores where employees who held the same job as plaintiff worked); *Franco v. Bank of America*, 2009 U.S. Dist. LEXIS 111873, at *2, *10-11 (S.D. Cal. 2009) (declining to require disclosure of contact information beyond three locations where plaintiff worked); *Martinet v. Spherion Atlantic Enterprises, LLC*, 2008 U.S. Dist. LEXIS 481 13, at *2-4 (S.D. Cal. 2008) (limiting discovery in PAGA action to single office where plaintiff worked).

⁸⁴ *Cunningham v. Leslie's Poolmart, Inc.*, 2013 WL 3233211, at *8 (C.D. Cal. 2013).

⁸⁵ *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010); *Willner v. Manpower Inc.*, 2014 U.S. Dist. LEXIS 123450; see, also, *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* 48 Cal.App.3d 134, 148 (1975) ["Any attempt to include in a class settlement terms which are outside the scope of the operative complaint should be closely scrutinized by the trial court to determine if the plaintiff genuinely contests those issues and adequately represents the class"].

Can employees reject a PAGA judgment and bring their own separate case?

No. A PAGA judgment is final as to all non-party, aggrieved employees, as well as the government.⁸⁶

How do employees receive notice of a PAGA case, settlement, or judgment?

Except to the degree that the LWDA receives 75% of PAGA settlements or judgments and employees receive their individual portion of the 25% they are allocated, there are no notice provisions in PAGA regarding case resolution.

Do judges require trial plans for PAGA cases similar to class actions?

Probably.

Judge Amy Hogue in Los Angeles Superior Court, Complex Department (Central Civil West) in her standing courtroom order states as follows:

Before granting motions for class certification, Judge Hogue requires the moving party to submit a ***class action trial management plan*** as described by the California Supreme Court in *Duran v U.S. Bank National Association*. The trial management plan should identify witnesses and specify offers of proof on each element of each cause of action and damages to be tried. It should identify matters of common proof and allow for litigation of relevant affirmative defenses whether or not they turn on individualized issues. Please attach the trial management plan as an exhibit to any motion for class certification. ¶ Before proceeding to trial on a PAGA claim, the Court requires PAGA plaintiffs to prepare a ***PAGA Trial Management Plan*** containing the same information. (Original Emphasis.)

Judge Fernando M. Olguin has required a trial plan that: (a) describes compliance with the requirements of PAGA; (b) identifies the “aggrieved employees” for purposes of the PAGA claim; (c) proposes a plan for the court’s evaluation of the aggrieved employees’ claims, with citations to relevant case law; and (d) describes

⁸⁶ *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009).

the evidence he plans to put forth in support of his claim that each aggrieved employee has suffered a violation.⁸⁷

Does a jury hear PAGA claims?

Probably not. Claims for penalties are considered equitable claims usually heard by the court without a jury.⁸⁸

Does a judge have discretion at trial or summary judgment to reduce or award less than the full amount of penalties called for by statute? How much less?

Yes. PAGA specifically provides that “a court may award a lesser amount than the maximum civil penalty” based on the facts and circumstances of the case “if to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”⁸⁹ Thus far there are no reported decisions discussing the parameters of the reduction.

What are some examples of PAGA post-trial results?

- *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157 (2008) (requested \$500,000; awarded \$258,900; Trial Judge Steven Brick, Alameda County Superior Court)
- *Fleming v. Covidien, Inc.*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011) (requested \$2,800,000; awarded \$500,000; C.D. Cal. Trial Judge Gary Klausner)
- *Ghrdilyan v. RJ Financial* (LASC 2012) (requested \$5,433,768; awarded \$325,000; total PAGA award \$969,117 including penalties, unpaid wages, fees, and costs. Trial Judge Ronald Sohigan, Los Angeles Superior Court)

⁸⁷ *Zackaria v Wal-Mart Store, Inc.*, 2015 U.S. Dist. LEXIS 151351, at 27 (C.D. Cal. 2015)

⁸⁸ See *Beasley v Wells Fargo Bank* 235 CA 3d 1383, 1393 (1991); *DiPirro v. Bondo Corp.* 153 Cal.App.4th 150, 182 (2007) (assessing civil penalties “is the kind of calculation traditionally performed by judges rather than a jury, and does not require a jury trial for that purpose in a civil action”); *Mendoza v. Ruesga*, 169 Cal.App.4th 270, 288, fn. 9 (2008) (“a claim for civil penalties . . . is a matter for the trial court rather than a jury”); *People v. Bestline Products, Inc.*, 61 Cal.App.3d 879, 916 (1976) (no right to jury trial so long as action is for penalties); *Tull v. U.S.* 481 U.S. 412, 427 (1987) (“We therefore hold that a determination of a civil penalty is not an essential function of a jury trial”).

⁸⁹ Section 2699(e)(2).

- *Thurman v. Bayshore Transit Mgmt.*, 203 Cal.App.4th 1112 (2012) (requested \$512,000; awarded \$358,588; Trial Judge Tim Taylor, San Diego Superior Court)
- *Guifi Li v. A Perfect Day Franchise, Inc.*, 2012 U.S. Dist. LEXIS 83677 (2012) (\$3,334,942 requested; \$2,764,896 default judgment ordered after jury dismissed)
- *Alatorre v. Cowboy Burgers & Barbecue, Inc.* (San Bernadino Superior Court) (awarded \$229,500)
- *Aguirre v. Genesis Logistics*, 2013 U.S. Dist. LEXIS 189815 (2013) (requested \$1,800,000; awarded \$500,000; C.D. Cal. Trial Judge James Selna)
- *Molina v. Dollar Tree*, 2013 U.S. Dist. LEXIS 72740 (E.D. Cal. 2013) (Defense Judgment; Trial Judge Beverly Reid O'Connell)
- *Elder v. Schwan Food Co.*, 2013 Cal.App.Unpub. LEXIS 1472, 11, 19-20 (2013) (appeal affirming reduced award of \$2500 individual civil penalty award)
- *Atempa v. PAMA, Inc.* (San Diego Superior Court) (awarded \$170,333)
- *In re Taco Bell Wage and Hour Actions*, 2016 U.S. Dist. LEXIS 48557 (E.D. Cal. 2016) (PAGA penalties denied after trial)
- *Makabi v. Gedalia*, 2016 Cal. App. Unpub. LEXIS 1489 (2016) (court found in favor of plaintiffs on labor code claims but declined to award penalties)