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# Employer Perspective: PAGA 15 Years Later

By Laura Reathaford

This year marks 15 years since the California Legislature enacted the Private Attorneys General Act of 2004,[1] or what is commonly referred to as "PAGA." PAGA allows an individual to collect civil penalties on behalf of the State of California for purported Labor Code violations experienced by him or herself and other employees (on a representative basis). Since PAGA's enactment, courts have considered constitutionality, removability, manageability, arbitrability, and the proper scope of discovery, among other litigation issues.

In 2009, the California Supreme Court in *Arias v. Superior Court*[2] held that class certification requirements do not apply to PAGA representative actions—even though PAGA bears many similarities to class actions. In 2012, the Court in *Iskanian v. CLS Transportation Los Angeles, LLC*[3] held that individual arbitration agreements with class action waivers cannot be enforced against employees who filed representative PAGA claims.

Even though most PAGA representative actions exceed $5 million in exposure, in 2013, the Ninth Circuit Court of Appeals in *Urbino v. Orkin Services of California*[4] held that the Class Action Fairness Act[5] (CAFA) did not apply to PAGA actions because the civil penalties that employees could collect could not be combined to meet the $5 million amount in controversy requirement. Thus, plaintiffs can file "PAGA only" lawsuits without the threat of having their potentially high value representative cases removed to federal court.

In 2017, the California Supreme Court in *Williams v. Superior Court*[6] held that a PAGA representative plaintiff is entitled to receive the names and addresses of any and all "aggrieved employees" (no matter how broadly defined) without having to show any *indicia* of harm by himself or herself to justify such disclosure.

In 2018, the court of appeal in *Huff v. Securitas Services USA, Inc.*[7] held that a PAGA plaintiff could bring a PAGA claim and sue for Labor Code violations that did

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not directly affect him or her. Thus, if an employee missed a meal period, for instance, he or she could seek penalties for violations of California's overtime laws even without having worked one minute of overtime himself or herself.

In short, over the past 15 years, PAGA's reach has become broad, deep, and arguably out of control.

Recognizing this insurgence of unfavorable case law for employers, a California industry group, California Business & Industrial Alliance (CABIA), says it wants the state "to enforce its own labor laws, rather than giving trial attorneys the power to do so."[8] Its approach: suing the State of California and challenging PAGA as unconstitutional on an "as-applied" basis.

Challenging PAGA as unconstitutional is nothing new. Many courts (including the California Supreme Court) have already weighed in on many of CABIA's claims. However, what makes this lawsuit unique is CABIA's attack on court decisions (including those noted above) and the plaintiffs' bar. The Complaint states:

> [T]he current construction of PAGA by California courts (which have their own constitutional infirmities) gives rise to the following unconstitutional framework: valid and binding arbitration agreements are rendered unenforceable; private contingency-fee attorneys are permitted to litigate on behalf of the State without oversight or coordination with any State official; private attorneys are allowed to negotiate settlements that enrich themselves at the expense of everyone but themselves; due process protections embodied in class action procedural rules do not apply; trial courts are divested of discretion to manage certain discovery issues; "fishing expeditions" are expressly authorized, allowing discovery into claims and theories about which a litigant has no personal knowledge. . . .
>
> The above, plus the complete lack of oversight by the legislative, executive, and judicial branches of the California State government, has allowed PAGA to become a tool of extortion and abuse by the Plaintiffs' Bar, who exploit the special standing of their PAGA plaintiff clients . . . and extract billions of dollars in settlements, their one-third of which comes right off the top.

Based on these (and many other) allegations, CABIA asserts four general legal theories: (1) PAGA violates the California separation of powers doctrine; (2) PAGA violates various due process clauses found in both the California state and federal Constitutions; (3) PAGA violates the Eighth Amendment Excessive Fines and Unusual Punishment Protections, and; (4) PAGA violates both federal and state equal protection laws.

CABIA's lawsuit attacks the delegates and their attorneys (listing many of them in the lawsuit without actually naming them as defendants) as shameless bounty hunters, claiming that "[t]he Legislature's unfettered and unconstitutional delegation of State power to the Plaintiffs' Bar without any oversight or coordination, has allowed the Plaintiffs' Bar to enrich themselves at the expense of the State and the alleged aggrieved for whom they are supposed to advocate."[9]

Is this unconstitutional? According to CABIA, it is:

> During the vast majority of these mediations, the Plaintiffs' Bar engages in practices made possible by PAGA which, as applied to Plaintiff s members and other California employers, are unconstitutional under State and federal law, including, but not limited to:
>
> a. Not requiring the "aggrieved employee" to attend the mediation;
> b. Not consulting with the "aggrieved employee" or the State before agreeing to a settlement of PAGA claims;
> c. After using PAGA to avoid arbitration (and the effect of a class waiver), attempting to settle for the value of Labor Code violations and allocate only a very small portion of the settlement to PAGA, thereby minimizing the share of the recovery that goes to the State;
> d. Threatening to pursue the life savings, homes, college tuition funds, and other personal property as a means to intimidate and coerce those connected with an employer-business to pay large settlements, very little of which is normally allocated to PAGA in the end.[10]

Of course, the State of California disagrees and has demurred to the entire lawsuit. The State primarily argues that:

> The Complaint does not identify even a *single* instance in which a PAGA case allegedly resulted in an unconstitutionally high penalty award against a California employer. Instead, it gives one "example" of how "the *allegation* by a single employee that an employer has unknowingly underpaid

him or her by just a few dollars *could* provide the basis for millions of dollars in penalties.[11]

This argument rings true (even to CABIA), which admits in its Complaint that in many PAGA cases, the parties engage in settlement discussions and "arrive at a sum that will resolve the underlying statutory claims on a class-wide basis and the private . . . attorney usually suggests a very small allocation of that total to PAGA . . ."[12]

Recognizing that most PAGA settlements are ultimately small, is the threat of potentially millions of dollars in penalties unconstitutional? Stay tuned.

In other news, two notable PAGA lawsuits are pending at the California Supreme Court. The first is *Kim v. Reins International California, Inc.*,[13] where the court will consider whether an employee who accepts a statutory offer of compromise resolving his underlying Labor Code claims has lost his "aggrieved employee" status and standing as a PAGA representative plaintiff. The second is *Lawson v. ZB, NA*,[14] where the court will determine whether PAGA claims for purported violations of Labor Code § 558 may be split between victim-specific and civic relief. If the former, the court will decide whether the victim-specific PAGA claims can be compelled to arbitration.

What's next for PAGA? The current case law trajectory suggests that PAGA's reach will only increase. However, the lower appellate rulings in *Kim* and *Lawson* (both of which applied PAGA more restrictively) suggest the tide may be changing.

And what about PAGA legislative review? While CABIA's constitutionality arguments seem somewhat questionable at this stage, there are other problems with PAGA that the Legislature can (and arguably should) address.

First—there is no reason for the additional civil penalties. PAGA was enacted because the state lacked critical and necessary resources to enforce the Labor Code. The Labor Commissioner was permitted to collect unpaid wages on behalf of employees and was only permitted to collect civil penalties for certain *limited* Labor Code provisions.

After PAGA, civil penalties were added for any and all violations of the Labor Code provisions which did not previously allow for civil penalties. It is unclear how the delegation of state authority to private litigants justifies creating civil penalties that could not have been enforced by the Labor Commissioner to begin with.

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Second—there is no reason to "stack" PAGA penalties. Many employers settle PAGA lawsuits merely because the "exposure" for these claims exceeds seven or eight figures. This exposure is based on the allegations that an employee can collect a $100 civil penalty for each and every purported violation of the Labor Code in the same period. So, if an employee claims he was not paid all wages, not paid overtime, missed a meal and a rest break and was not paid an accurate itemized wage statement, he will seek at least $500 in PAGA penalties for just one pay period. If he claims these violations occurred in all 52 pay periods, his claim has now increased to $26,000. And, if he seeks to represent 100 other employees who he believes have the same claims, his lawsuit is now estimated at $2.6 million dollars.

Third—individual PAGA claims should be expressly permitted and enumerated. Over the years, various courts have disagreed as to whether a PAGA claim can be brought on a purely individual basis or whether a PAGA claim can only be brought on a representative basis.[15] The statute is unclear. If it were clarified, employers might feel less "threatened" by the massive exposure frequently linked with purely representative actions and might be more inclined to resolve PAGA claims early (and potentially remedy any associated Labor Code violations).

Lastly—plaintiffs could be required to prove their "aggrieved status" first. While class action requirements do not apply to PAGA actions, the named plaintiff in a class action must show that his or her claims are "typical" of the group he or she seeks to represent. This serves the purpose of deterring frivolous lawsuits. Since representative actions (like class actions) are potentially very expensive to litigate, employers and the courts could arguably feel less burdened if the individual representatives were required to

prove their claims first—before engaging in lengthy discovery and trial preparation on behalf of the larger group.

The state of PAGA is in flux. What we do know is that there are no shortages of challenges and no shortage of legal developments. While it is doubtful PAGA will disappear completely, the Legislature should be willing to consider ways to amend and perhaps narrow PAGA's reach so that it fulfills PAGA's original goal of Labor Code enforcement.

## ENDNOTES

1. Cal. Lab. Code §§ 2698–2699.6.
2. 46 Cal. 4th 969 (2009).
3. 59 Cal. 4th 348 (2012).
4. 726 F.3d 1118 (2013).
5. Pub. L. No. 109-2, 119 Stat. 4, codified primarily at 28 U.S.C. §§ 1711–1715.
6. 3 Cal. 5th 531 (2017).
7. 23 Cal. App. 5th 745 (2018).
8. *See CABIA Files Lawsuit Against California Over Paga*, available at https://www.cabia.org/cabia-files-lawsuit-against-california-over-paga/.
9. *See* Complaint, page 40, para. 107, *CABIA v. Xavier Becerra*, 30-2018-01035180-CU-JR-CXC (Cal. Superior Ct. Nov. 18, 2018), available at https://www.cabia.org/app/uploads/2019/02/CABIA-Complaint.pdf.
10. *Id.*, page 34, para. 101.
11. *See* Demurrer, page 14, lines 19-23, *CABIA v. Xavier Becerra*, 30-2018-01035180-CU-JR-CXC (Cal. Superior Ct. Feb. 1, 2019), available at https://www.cabia.org/app/uploads/PointsandAuthoritiesDemurrer.pdf.
12. *See* Complaint, *supra* note 9, page 25, para. 80.
13. 18 Cal. App. 5th 1052 (2017), *review granted*, 230 Cal. Rptr. 3d 681 (2018); S246911/B278642.
14. 18 Cal. App. 5th 705 (2017), *review granted*, 230 Cal. Rptr. 3d 440 (2018); S246711/D071279.
15. *See Rope v. Auto-Chlor Sys. of Wash., Inc.*, 220 Cal. App. 4th 635 (2013) (lawsuits under "PAGA must be representative actions") as compared to *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2012) (plaintiff could pursue individual PAGA claims in arbitration).

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