EMPLOYMENT LAW COMMENTARY
JANUARY 2019

PAGA: A CALL TO ARMS

By: Karen J. Kubin Senior Counsel at Morrison & Foerster

Whatever good intentions its proponents may claim, the Labor Code Private Attorneys General Act of 2004 (PAGA) created perverse incentives for plaintiff's lawyers to file representative actions seeking civil penalties for violations of the California Labor Code on behalf of all "aggrieved employees" of the named plaintiff's employer. The named plaintiff often does not know she is being used for purposes of bringing a PAGA action. The alleged violations are often hyper-technical or trivial, if a violation at all – "gotcha" claims, as plaintiff's lawyers like to call them. The "aggrieved employees" – who can number in the tens of thousands if the target is a large employer – most often have suffered no injury. The employer, facing potentially business-destroying liability, too often settles for an amount of money bearing no relationship to the violations allegedly committed. And the plaintiff's lawyers pocket 30-35 percent of the settlement for themselves.

This article addresses some of the pressing issues around PAGA, in three parts. First, it provides an overview of salient aspects of PAGA and the case law interpreting it. Next, it discusses a recently-filed lawsuit that seeks to have PAGA declared unconstitutional. Finally, it offers suggestions for warding off a PAGA action or winning the action if brought.

The takeaway: In today's climate, virtually every California employer is vulnerable to a PAGA attack and taking steps to avoid or defeat PAGA liability should be given high priority.

PAGA: An Overview

PAGA deputizes an "aggrieved employee" – any person employed "by the alleged violator and against whom one or more of the alleged violations was committed"[1] – to file suit as proxy for the State of California to recover civil penalties on behalf of himself and other "aggrieved employees" for alleged violations of the Labor Code. Seventy-five percent of any penalties recovered in the action, whether by settlement or judgment, go to the State, and the remaining 25 percent go to the alleged aggrieved employees.[2] While a single penalty for a single violation suffered by a single individual may be trifling, when aggregated

Attorney Advertisement Redistributed with permission from: Morrison and Foerster

across an entire workforce for multiple alleged violations, the amount of these penalties can be staggering. And, attorneys' fees are awardable to the plaintiff employee who prevails in the action, but not to the prevailing employer.[3]

Starting in 2009, a number of court decisions eliminated several defenses theretofore available to employers defending PAGA actions. Notably among them, in *Arias v. Superior Court*,[4] the California Supreme Court held that PAGA actions are not subject to state-law requirements for a case to be certified as a class action. In *Iskanian v. CLS Transportation Los Angeles, LLC*,[5] the Supreme Court held that an arbitration agreement waiving representative PAGA claims is unenforceable as a matter of California public policy. In light of *Arias* and *Iskanian*, plaintiff's lawyers increasingly join class action claims with PAGA claims or solely allege PAGA claims in their complaints. In the past year, two additional court of appeal decisions addressing the scope of PAGA have emboldened plaintiffs' lawyers to interpret it even more broadly, resulting in increasingly expansive – and expensive – PAGA suits.[6]

THE CONSTITUTIONAL CHALLENGE

Apparently deciding enough is enough, a recently-organized association holding itself out as representing California-based employers filed suit against the State of California on November 28, 2018, seeking to have PAGA declared unconstitutional on separation of powers, procedural and substantive due process, excessive fines and unusual punishment, and equal protection grounds.[7] The association's complaint is well-researched, thorough, and thoughtful. The opening paragraphs sum up its position:

"Are California business owners who inadvertently make a payroll error equivalent to the worst perpetrators of hate crimes? That's the twisted logic that, more than a decade ago, led the state legislature to pass a harmful law called the Private Attorneys General Act (PAGA).

"PAGA was conceived as a means to help employees right workplace wrongs without further burdening the state bureaucracy. Trial attorneys quickly discovered that they could use the law for their own benefit; today, thousands of PAGA complaints are filed annually against large and small businesses, nonprofit charities, and even labor unions.

"PAGA, as written and practiced, is unconstitutional. With this complaint, we're asking the state to enforce its own laws – rather than transferring the state's power to private attorneys who operate for their own personal gain."[8]

This author wishes the association success in overturning PAGA. But best case, it will take years to achieve that result. What does an employer do in the meanwhile? That question is addressed next.

AVOIDING OR DEFEATING A PAGA ACTION

There are many things an employer can do to minimize the risk of getting sued in a PAGA action, and many ways to successfully defend itself if sued; surveying all of them is beyond the scope of this article. Rather, we focus on two important issues.

An Ounce of Prevention

Given the ever increasing number of new PAGA filings, it is critical that employers have policies and practices that comply with the Labor Code and the IWC Wage Order

Attorney Advertisement Redistributed with permission from: Morrison and Foerster

applicable to the employer's business. Periodically conducted audits to ensure that these policies and practices remain legally compliant are advised. Human resource professionals must stay current on legal developments to address any needed updates. PAGA makes unique the challenges a California employer faces, and these challenges should not be underestimated. While perhaps trite, it is no less true: an ounce of prevention is worth a pound of cure.

Defeating a PAGA Action as Unmanageable

PAGA empowers an "aggrieved employee" only to sue on behalf of other employees who are "aggrieved," i.e., employees "against whom one or more alleged violations was committed."[9] California trial courts are increasingly striking PAGA claims where the experience of every allegedly aggrieved employee would be required to show that they were, in fact, aggrieved, rendering the claim unmanageable because countless mini-trials would be necessary before the aggrieved employees were known and the claim could proceed.[10] So too are federal district courts striking PAGA claims when they cannot be manageably tried.[11] Consistent with this emerging body of law, the California Supreme Court recently recognized the common-sense fact that PAGA actions must be "manageable."[12]

Unmanageability has thus emerged as a powerful weapon in defendants' arsenal. It is the plaintiff's burden to show how her PAGA action can be manageably tried, and if she fails to meet her burden, the action cannot go forward. While unmanageability may not apply in a particular case, it should at least be considered in every case, in the course of devising a winning strategy.

[1] Cal. Lab. Code, § 2699, subd. (c).

[2] *Id.*, § 2699, subd. (i).

[3] *Id.*, § 2699, subd. (g)(1).

[4] (2009) 46 Cal.4th 969.

[5] (2014) 59 Cal.4th 348.

[6] *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, review den. Jan. 16, 2019; *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, rehg. den. June 13, 2018, review den. Aug. 8, 2018.

[7] *California Business & Industrial Alliance v. Becerra*, Orange County Superior Court Case No. 30-2018-01035180-CU-JR-CXC (filed Nov. 28, 2018), https://www.cabia.org/pdf/CABIA-Complaint.pdf.

[8] *Id.*, Complaint at 2.

[9] Cal. Lab. Code, § 2699, subd. (c).

[10] See, e.g., *Sanchez v. McDonald's Restaurants of California, Inc.* (Los Angeles Super. Ct., Dec. 15, 2016, No. BC499888) Court Ruling at pp. 4-5 [striking PAGA representative allegations]; and see *Banta v. American Medical Response Inc.* (Los Angeles Super. Ct., Apr. 25, 2018, No. BC393113) Order [same]; *Martinez v. California Pizza Kitchen, Inc.* and *Hernandez v. California Pizza Kitchen, Inc.* (Los Angeles Super. Ct., Mar. 30, 2015, Nos. BC373758, BC441231) Orders [same]; *Bright v. 99 Cents Only Stores* (Los Angeles Super. Ct., Dec. 7, 2011, No. BC415527) Order [same]; *Munoz v. Acapulco Rest., Inc.* (Los Angeles Super. Ct., Oct. 21, 2010, No. BC393912) Order [same].

735 Tank Farm Road, Suite 224
San Luis Obispo, CA 93401
www.eaglawgroup.com
phone 805.782.9900
fax 805.782.9901

Attorney Advertisement Redistributed with permission from: Morrison and Foerster

[11] See, e.g., *Amiri v. Cox Communications California, LLC* (C.D. Cal. 2017) 272 F.Supp.3d 1187, 1195 [striking PAGA claims as unmanageable where the alleged Labor Code violations were based on the plaintiff's experience rather than on policies or practices common to "aggrieved employees," and "liability determinations will require individualized inquiries"]; *Salazar v. McDonald's Corp.* (N.D. Cal., Jan. 5, 2017, No. 14-cv-02096-RS) 2017 WL 88999, at *9 [granting defendant's motion to strike representative PAGA claim]; *Brown v. American Airlines, Inc.* (C.D. Cal., Oct. 5, 2015, No. CV 10-8431-AG (PJWx)) 2015 WL 6735217, at *4 ["Court finds manageability issues exist regarding PAGA overtime claims here. There appears to be too many individualized assessments to determine PAGA violations concerning overtime pay."]; *Raphael v. Tesoro Ref. and Mktg. Co. LLC* (C.D. Cal., Sept. 25, 2015, No. 2:15-CV-02862-ODW) 2015 WL 5680310, at *3 ["Court would have to engage in a multitude of individualized inquires making the PAGA action unmanageable and inappropriate."]; *Bowers v. First Student, Inc.* (C.D. Cal., Apr. 23, 2015, No. 2:14-CV-8866-ODW (Ex)) 2015 WL 1862914, at *4 [same]; *Litty v. Merrill Lynch & Co.* (C.D. Cal., Nov. 10, 2014, No. CV 14-0425 PA PJWx) 2014 WL 5904904, at *3 [same]; *Ortiz v. CVS Caremark Corp.* (N.D. Cal., Mar. 19, 2014, No. C-12-05859 EDL) 2014 WL 1117614, at *3-4 [same].

[12] *Williams v. Superior Court* (2017) 3 Cal.5th 531, 559.

735 Tank Farm Road, Suite 224
San Luis Obispo, CA 93401
www.eaglawgroup.com
phone 805.782.9900
fax 805.782.9901

Attorney Advertisement Redistributed with permission from: Morrison and Foerster