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Defending Class and Representative Wage-and-Hour Actions in California

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Agenda

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- Class Action Overview
- PAGA Overview
- Statutes of Limitations
- Arbitration Agreements and Class Action Waivers
- Discovery in Class Action and PAGA Cases
- PAGA Standing
- Manageability
- Settlement
- Trends

Class Action Overview

Class Action Overview

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- Litigated by a named plaintiff on behalf of defined putative class
- Plaintiffs often seek to define the class as broadly as possible
  - E.g., “all non-exempt employees in the state of California”
- Classwide damages – often high-stakes litigation
- Attorneys’ fees
  - Labor Code § 218 – available in actions for “nonpayment of wages” (not for meal and rest break violations)
  - Labor Code § 1194 — failure to pay minimum wage or overtime

Class Action Requirements (Fed R. Civ. Proc. 23(a))

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- Class Requirements:
  - (1) Numerosity
  - (2) Commonality
    - *Wal-Mart Stores, Inc. v. Dukes* 564 U.S. 338 (2011) – "[w]hat matters … [is] the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation"
  - (3) Typicality
  - (4) Adequacy
    - Interests of representative plaintiffs are aligned with rest of proposed class
    - Adequacy of counsel
- Unless all four requirements met, case cannot proceed as a class action
- These requirements are not difficult to satisfy in all cases

Class Action Prerequisites (Fed R. Civ. Proc. 23(b))

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- Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
  - (1) Prosecuting separate actions by or against individual class members would create a risk of
    - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
    - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
  - (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

Class Action Prerequisites (Fed R. Civ. Proc. 23(b))

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- Most wage-and-hour cases turn on the "predominance" requirement
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
  - (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
  - (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
  - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
  - (D) the likely difficulties in managing a class action.

Class Action Requirements: State Court

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- Code Civ. Proc. § 382
  - "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

PAGA Overview

Private Attorneys General Act (PAGA)

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- Passed in 2003 when California claimed insufficient resources to prosecute Labor Code violations

- Authorizes "aggrieved employees" to seek civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations
  - "Sue your boss" law

- Applies to most Labor Code violations

PAGA Prerequisites

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- PAGA plaintiff must provide notice to LWDA of Labor Code provisions allegedly violated and supporting "facts and theories." Labor Code § 2699.3(a)(1)(A).
  - PAGA notice theoretically gives LWDA the opportunity to investigate
  - The LWDA very rarely takes action

- After 65 days, the PAGA plaintiff can bring suit

- Deficient notice can result in dismissal for failure to exhaust administrative remedies

PAGA Penalties

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- Civil penalties, not statutory penalties
  - Civil penalties are designed to punish and deter, not "redress employees' injuries." *Kim v. Reins Int'l Cal., Inc.*, 9 Cal.5th 73, 86.

- "Gap-filler" penalties apply where a civil penalty not specifically provided
  - $100 / $200 for "initial" / "subsequent" violations

- Most recovered penalties go to the State
  - 75% to LWDA / 25% to "aggrieved" employees

- Judge has discretion to reduce penalties

➢ Attorney's fees also available to prevailing employee

PAGA Penalties

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- $100,000 settlement
  - Attorney's fees of 25% off the top = $25,000

- $75,000 remaining after attorney's fees
  - LWDA gets 75% = $56,250
  - Aggrieved employees get 25% = $18,750

- Attorneys get **33% more** than the aggrieved employees

PAGA vs. Class Actions

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- Difficult remove
  - No aggregating penalties
  - No CAFA
- Not subject to class action requirements
- Relaxed standing requirements
- No right to a jury trial

Statutes of Limitations

Labor Code Statutes of Limitations

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- 1 Year
  - Wage Statement Penalties (Labor Code § 226)
  - Penalties for Violation of Wage Order and Certain Labor Code sections. (Labor Code § 226)
  - Penalties for Failure to Provide Timely Records and Inspection (Labor Code § 1198.5)
  - PAGA Penalties (Labor Code § 2699) (+65 days for "notice" tolling)
  - Waiting Time Penalties (Labor Code § 203), when there is no underlying claim for unpaid wages. *Pineda v. Bank of America, N.A.*, 50 Cal.4th 1389 (2010)

Labor Code Statutes of Limitations

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- 3 Years
  - Waiting Time Penalties (Labor Code § 203), when action includes claim for unpaid wages
  - Meal and Rest Premium Pay (Labor Code § 226.7)
  - Reimbursement of Business Expenses (Labor Code § 2802)
  - Unpaid Wages (Labor Code § 338)
  - Unpaid Overtime (Labor Code § 338)
- 4 years: Unfair Competition Law (Bus. & Prof. Code § 17200)
  - Effectively expands the statute of limitations on a Labor Code wage claim from 3 years to 4 years
  - Does not apply to non-wage claims, such as waiting time penalties or wage statement penalties

Arbitration Agreements and Class Action Waivers

Arbitration Agreements

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- *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014)
  - But not in a PAGA case

- *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612 (2018)
  - Mandatory class action waivers in arbitration agreements are fully enforceable

Arbitration Agreements: AB 51

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- AB 51
  - Prohibits employers, as a condition of employment, requiring applicants or employees to "waive any right, forum, or procedure for a violation of any provision of [FEHA] or [the Labor Code]…"
  - Effectively prohibits mandatory arbitration agreements in the employment context
- California has been enjoined from enforcing the new law on the grounds that it interferes with the Federal Arbitration Act's goal of promoting arbitration. *Chamber of Commerce of the US, et al. v. Xavier Baccerra, et al.*, 438 F. Supp.3d 1078 (E.D. Cal., Feb. 7, 2020)

Discovery in Class Action and PAGA Cases

Class Action Discovery

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- Disclosure of class member names and contact information
  - Need to strike a balance between plaintiff's right to communicate with class members and an employer's duty to maintain the confidentiality of personal information of its employees
  - *Belaire-West* notice procedure
- Bifurcated Discovery?
  - Pre-certification "Class" Discovery
    - Focused on certification issues: Numerosity, Commonality, Typicality, and Adequacy
    - Names and contract information of putative class members (who did not opt-out)
    - Sampling of time and payroll records
    - Named plaintiffs' individual claims
  - Post-certification "Merits" Discovery
  - Distinction between class and merits discovery can be a blurry line

PAGA Discovery

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- *Williams v. Superior Court*, 3 Cal.5th 531 (2017)
- Plaintiff's View
  - Single plaintiff, who worked in a single position, in a single location can bring PAGA claims on behalf of thousands of employees who performed dozens of different jobs in locations across California
  - Based on vague allegations of Labor Code violations, plaintiff can require defendant to respond to expensive and burdensome discovery
- Defendant's View
  - Traditional limits on discovery should apply (e.g., undue burden)

Discovery: Employee Interviews

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- A defendant is generally not barred from communicating with putative class members (or allegedly "aggrieved" employees)
- BUT be sure to handle communications carefully and put in place the proper safeguards, including:
  - Communicating the purpose of the questioning to the employee prior to the interview
  - Assuring the employee that no reprisal will take place
  - Explaining that participation in the interview is completely voluntary
- If asking an employee to sign a declaration, be sure that they understand that it's a sworn declaration and that the declaration can be used against them to limit their recovery

PAGA Standing

Huff v. v. Securitas Security Services USA, Inc., 23 Cal.App.5th 745 (2018)

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- Aggrieved employee who suffered at least one Labor Code violation can pursue PAGA penalties for unrelated violations by the same employer
  - Impact: No need for representative plaintiff for each and every alleged PAGA violation

- *Huff* holding does not apply in federal court

Magadia v. Wal-Mart Associates, Inc., 999 F.3d 668 (9th Cir. 2021)

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- Employee does not have Article III standing to pursue a PAGA claim in federal court for Labor Code violations that the employee did not suffer.
  - Contrary to the rule in California State court that permits any aggrieved employee to pursue a PAGA claim for any Labor Code violation suffered by other employees
- *John Ornelas v. Tapestry, Inc.*, 2021 WL 2778538 (N.D.Cal. Jul. 2, 2021)

Crestwood Behavioral Health, Inc. v. Superior Ct. of Alameda Cnty., 60 Cal.App.5th 1069 (2021)

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- Question of venue in PAGA action
  - Plaintiff filed complaint in Alameda County, a county where Plaintiff never worked
  - Alleged statewide violation - complaint alleged that Defendant operated a chain of treatment centers and employed aggrieved employees across California, including Alameda
- In a PAGA action, venue is proper in any county in which an aggrieved employee worked and Labor Code violations occurred.

PAGA Standing under *Kim v. Reins*

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- *Kim v. Reins International California*, 9 Cal.5th 73 (2020)
  - "Settlement of individual claims does not strip an aggrieved and employee of standing, as the state's authorized representative, to pursue PAGA remedies"
  - "The Legislature defined PAGA standing in terms of violations, not injury. Kim became an aggrieved employee, and had PAGA standing, when one or more Labor Code violations were committed against him. (See § 2699(c).) Settlement did not nullify these violations. The *remedy* for a Labor Code violation, through settlement or other means, is distinct from the *fact* of the violation itself."

Kim v. Reins: Open Questions

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- What if the settlement agreement specifically included PAGA claims?
  - In *Kim v. Reins*, the plaintiff's settlement specifically excluded the pending PAGA claim.
- What if the settling plaintiff could have raised, but chose not to raise, PAGA claims in the original lawsuit?
  - Barred by *res judicata?*
  - *Villacres v. ABM Industries Inc.*, 189 Cal.App.4th 562 (2010) (claim preclusion barred subsequent PAGA suit because 'PAGA claims *could have been raised in the prior action*)

Zamora v. Walgreens, 747 Fed.Appx.619 (9th Cir. 2019)

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- Plaintiff had participated in a wage and hour settlement regarding Walgreen's provision of meal and rest periods, payment of wages and overtime compensation, provision of accurate wage statements, and reimbursement of business expenses.
- Second PAGA action for failure to provide suitable seating to cashiers under Wage Order 7 not barred because the "two actions do not share an identical factual predicate."
- "Identical factual predicate" is a federal doctrine relevant to the defense of release, not *res judicata*

Manageability

Manageability: A Defendant's View

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- PAGA cases do not need to satisfy class action requirements. *Arias v. Sup. Ct.*, 46 Cal.4th 969 (2009)
  - *But class action requirements exist for a reason; want to avoid endless mini trials*
- PAGA cases, like class actions, need to be manageable and tried in a manner that protects the defendant's due process rights.
  - No use of "representative" evidence to paper over material variation in employee experience
  - Right to cross-examine
- Push plaintiffs to submit a trial plan
- Consider post-answer, evidence-based motion to strike

Settlement

Settling Class and PAGA Cases

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- Both require court approval
  - Class Actions: preliminary and final approval
  - PAGA: only one approval

- Standards for approval
  - Class Action: fair, adequate, and reasonable
  - PAGA: Unclear, but courts look to class action concepts

- Opt Out / Objections
  - Class Actions: can object and opt out
  - PAGA: no right to object or opt out (+ no right to notice)

Trends

Trends

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- Filing a class action and a separate PAGA action on behalf of the same employee against the same employer
- COVID-19 temperature checks
- Technical violations

Thank you!

Contact Us

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