



PAGA and Class Actions: What's New in 2022 and What's on the Horizon

January 27, 2022

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Class Action Landscape

- Lawyer-driven litigation
- Attorney solicitation
- Find a case and then a plaintiff (LinkedIn makes that easy)
- California's robust consumer protection framework (UCL; CLRA; FAL)
 - Recent attempts to test the CCPA private right of action
- Claims focused on:
 - Advertising
 - Marketing and product labeling
 - Pricing and fees
 - Consumer fraud
 - Privacy
 - Environmental representations
 - Accessibility
 - Product performance and warranties
 - Sales tax (alleged overcollection)
- Draw of statutory damages

Case Study

- The Telephone Consumer Protection Act (TCPA) Litigation Environment
- Relatedly, the outgrowth of claims under the Florida Telephone Solicitation Act (FTSA) post July 1, 2021
- How has the TCPA served as a model for the plaintiffs' class action bar?

Arbitration

- Public injunctive relief claims in California and how they have influenced consumer arbitration
- The emerging mass arbitration landscape
 - The players
 - The playbook
 - Role of litigation funding
 - Court challenges
 - Most recently, *Uber v. AAA* (NY); *Heckman v. Live Nation and Ticketmaster* (CA)
- Arbitration bodies (AAA; JAMS; NAM; FedArb; Fair Claims; ADR; CPR; New Era; etc.)
- How businesses are adapting to preserve the hallmarks of consumer-friendly arbitration while managing the abuse of their programs

California Private Attorneys General Act (PAGA)

- Gives one employee the ability to bring a “representative action” to recover penalties on behalf of all other “aggrieved employees”
- The Named Plaintiff stands in for the California Labor Commissioner to collect all of the penalties the Commissioner could collect under the Labor Code
- Even where the claim would not normally have a private right of action
- Penalties are either those stated in the statute or, if no penalty is stated, \$100 for initial violations and \$200 for subsequent violations, per employee per pay period and (potentially) for each separate Labor Code section violation

California Private Attorneys General Act (PAGA)

- Requires a pre-suit notice letter – very limited right to cure certain alleged violations
 - 33 days to cure
 - Must file a cure notice
 - Failure to provide accurate start and end date of pay period
 - Failure to provide the accurate name of the employing entity

Most Damaging Aspects of PAGA

- Mandatory Attorneys Fees
- Reduced standing requirements
- Potentially ambiguous statute of limitations for the named Plaintiff
- Reduced certification requirements (“PAGA only” cases are common)
- Very broad discovery (can get discovery on other employees and other locations)
- An individual cannot settle a PAGA claim (needs notice to the State and court approval)

Most Damaging Aspects of PAGA

- Not a class action for the Class Action Fairness Act
- Not subject to arbitration agreements and class action waivers

PAGA – Some Good News (Maybe)

Gunther v. Alaska Airlines contradicts *Raines v. Coastal Pacific*

- Only default PAGA penalties are available for inaccurate wage statements
- Default is \$100/\$200
- Cal. Labor Code 226.3 provides a penalty of \$250/\$1000
- *Gunther* holds that 226.3 is limited to where no wage statement was provided or where no records were kept
- In addition, the \$200 is only applicable where the employer is on notice from the Labor Commissioner or a court

PAGA – Some Good News (Maybe)

Reyes v. Kellermeyer

- Only a trial court order But -
- The court recognized that there is no authority for “stacking” penalties under PAGA
- Reiterated that subsequent violation rate is only applicable when the employer is on notice
- Recognized the difficulty of common proof
- Recognized that courts have wide latitude to reduce PAGA penalties – cited to *Carrington v. Starbucks* where the court reduced the penalties to only \$5 per pay period because the company’s violations were the result of human error
- Shows why PAGA settlements are often much lower than the full potential value

PAGA – Some Good News (Maybe)

Viking River Cruises v. Moriana

- Currently PAGA claims are not subject to arbitration agreements and avoid class action waivers
- Supreme Court has finally agreed to hear this issue
- Will likely have a profound impact on PAGA litigation in California

PAGA Reform could be on the ballot in 2022: *The Fair Pay and Employer Accountability Act of 2022*