



Understanding and Defending Class Action & PAGA Cases

Presented by
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Thomas S. Ingrassia is a shareholder and founding member of Pettit Kohn Ingrassia Lutz & Dolin and serves as co-chair of the firm's Employment and Labor Department. He represents a diverse spectrum of business entities and defends all forms of employment litigation before state and federal courts and administrative agencies.

Tom is a widely-acclaimed speaker who is frequently invited to provide employment practices and employee management training. He has been selected for inclusion in *San Diego Super Lawyers*® every year since 2008 and was recognized as one of San Diego's Top 50 Attorneys in 2016, 2017, and 2020. Tom has also been selected for inclusion in *Best Lawyers in America* every year since 2013 and has received Martindale-Hubbell's highest rating for legal ability and ethical standards.

Introduction

Class Action Litigation: A representative action wherein one or more employees (“Class Representatives”) seek to represent the interests of similarly situated employees.

- Class action employment claims generally seek recovery of damages and statutory penalties.
- Requirements to certify a class in federal court are:
 - Numerosity
 - Commonality
 - Typicality
 - Adequacy of representation(FRCP 23(a))

Introduction

California law requires both an “ascertainable class and a well-defined community of interest among class members.” (*Gattuso v. Hart-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 575.)

“Community of interest” is defined as:

- Predominant common questions of law or fact;
- A class representative with claims or defenses typical of the class; and
- A class representative who can adequately represent the class.

Court approval of all proposed settlements is required.

PAGA

The California Private Attorneys General Act of 2004 (Labor Code section 2699.3, et seq.)

- Permits an aggrieved employee to pursue recovery of civil penalties on behalf of the State of California.
- 75% of recovered penalties are remitted to the State; the remaining 25% is to be distributed to the aggrieved employees.
- No class certification is required.
- Court approval of proposed settlements is required.

Class Action and PAGA Claims at a Glance

	FLSA Class	California Class Claims	California PAGA Claims
Typical Scope of Claims	<ul style="list-style-type: none"> ❖ Minimum and overtime wages 	<ul style="list-style-type: none"> ❖ Minimum and overtime wages ❖ Meal Breaks ❖ Rest Breaks ❖ Expense Reimbursement ❖ Final pay ❖ Paystub violations 	<ul style="list-style-type: none"> ❖ Minimum and overtime wages ❖ Meal Breaks ❖ Rest Breaks ❖ Expense Reimbursement ❖ Final pay ❖ Paystub violations
Statute of Limitations	2 or 3 years	4 years	1 year
Class/Participant Inclusion Process	Opt-in	Opt-out	None
Primary Potential Recovery Sought/Available	<ul style="list-style-type: none"> ❖ Actual Damages ❖ Liquidated Damages ❖ Attorneys' Fees 	<ul style="list-style-type: none"> ❖ Actual Damages ❖ Liquidated Damages ❖ Statutory Penalties ❖ Attorneys' Fees 	<ul style="list-style-type: none"> ❖ Civil Penalties ❖ Attorneys' Fees
Personal Liability?	<ul style="list-style-type: none"> ❖ If inadequate adherence to corporate formalities ❖ Potentially 	<ul style="list-style-type: none"> ❖ If inadequate adherence to corporate formalities ❖ Any person who "causes" the violation to occur 	<ul style="list-style-type: none"> ❖ If inadequate adherence to corporate formalities ❖ Any person who "causes" the violation to occur

Combatting Class and Representative Actions

- I. Arbitration Agreements.
 - Introduction.
 - Impact on class actions.
 - Impact on PAGA claims.
 - New California legislation (AB 51/Labor Code sec. 432.6).

Combatting Class and Representative Actions

- II. On Duty Meal Break Agreements.
 - Not always applicable.

- III. Meal Break Waivers.
 - Only applicable for shifts lasting no more than six hours.

- IV. Staffing Models that Ensure Strict Compliance.

Are Subcontractors the Answer?

I. Introduction.

II. Federal Law.

- Utilizes the “economic realities” test.
- Each matter is determined on a case by case basis.
- Main areas of inquiry:
 - The nature and degree of control over the work by the principal.
 - The extent to which the services rendered are an “integral part” of the principal’s business.

Areas of Inquiry (cont'd)

- The permanency of the relationship.
- The amount of the worker's investment in facilities and equipment.
- The worker's opportunities for profit and loss.
- The degree of independent business organization and operation of the worker.
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the worker.

Are Subcontractors the Answer?

III. California Law: The “ABC Test”

New California Labor Code section 2750.3 provides that in order for a worker to be properly classified as an independent contractor, the entity retaining the worker must prove all of the following:

- The worker is free from the control and directing of the hiring company;
- The worker performs work that is outside the course of the hiring company’s business; and

Are Subcontractors the Answer?

- The worker is “customarily engaged in an independently established trade, occupation, or business of the same nature” as the work performed for the hiring entity.

Limited exemptions apply (physicians, surgeons, dentists, podiatrists, psychologists, attorneys, or veterinarians licensed by the State of California, certain direct salespeople, certain “business to business” contractors, etc.).

Note: The scope and application of the law is being modified through lobbying, additional legislation, and ballot measures, and will continue to be a dynamic issue.

The *Borello* Test

Even if a profession/position is excluded from the “ABC Test,” the *Borello* test will apply.

- *Borello* is a “right to control” test involving the following factors:
 1. Whether the person performing work is engaged in an occupation or business that is distinct from that of the Company;
 2. Whether the work is part of the Company’s regular business;
 3. Whether the Company or the worker supplies the equipment, tools, and the place for the work;
 4. The worker’s financial investment in the equipment or materials related to perform the work;

The *Borello* Test

5. The skill required in the particular occupation;
6. The kind of occupation, with reference to whether the work is usually done under the Company's direction or by a specialist without supervision;
7. The worker's opportunity for profit or loss depending upon his or her own managerial skill;
8. How long the services are to be performed;
9. The degree of permanence of the working relationship;
10. The payment method, whether by time or by the job; and
11. Whether the parties believe they are creating an employer/employee relationship.

Questions?



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