

# Well Represented: Strategies for Handling Class and PAGA Actions Before and During Litigation

Presented by

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**Ryan H. Nell** is an employment attorney responsible for representing California employers statewide in both counseling and comprehensive litigation support. With the ever-changing landscape of California and federal employment law, Ryan prides himself on assisting clients in staying ahead of the curve in an effort to avoid legal trouble before it arises. He has extensive experience representing clients in harassment, retaliation, and discrimination matters, as well as large-scale wage and hour lawsuits.

Ryan speaks regularly on a wide range of topics aimed at assisting California employers in the avoidance of legal trouble before it arises, and his work in the field has led to his recognition as a Rising Star by *San Diego Super Lawyers*®. Mr. Nell was also included in the 2021 and 2022 editions of *Best Lawyers: Ones to Watch* for his work in Labor and Employment Law – Management.

**Handling Class & PAGA Actions**





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**Marty Hochman** has many years of diverse in-house and law firm experience, including involvement in complex global business transactions, labor and employment matters, mergers and acquisitions, brand protection matters, corporate financing, litigation supervision and the management of outside counsel and worldwide legal teams. He regularly advises senior management and corporate boards on various legal, strategic and operational issues and conducts worldwide training and development classes on a broad array of legal and compliance matters.

Marty has worked at Callaway for 20 years. Callaway is a global leader in golf equipment, apparel, luggage, outdoor lifestyle, and golf entertainment, with a portfolio of brands including Callaway Golf®, Odyssey®, Topgolf®, OGIO®, TravisMathew® and Jack Wolfskin®.

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# Class and PAGA 101



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# Class Action 101

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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))

# Class Action 101

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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 101

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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"> <li>❖ Minimum and overtime wages</li> </ul>	<ul style="list-style-type: none"> <li>❖ Minimum and overtime wages</li> <li>❖ Meal Breaks</li> <li>❖ Rest Breaks</li> <li>❖ Expense Reimbursement</li> <li>❖ Final pay</li> <li>❖ Paystub violations</li> </ul>	<ul style="list-style-type: none"> <li>❖ Minimum and overtime wages</li> <li>❖ Meal Breaks</li> <li>❖ Rest Breaks</li> <li>❖ Expense Reimbursement</li> <li>❖ Final pay</li> <li>❖ Paystub violations</li> </ul>
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"> <li>❖ Actual Damages</li> <li>❖ Liquidated Damages</li> <li>❖ Attorneys' Fees</li> </ul>	<ul style="list-style-type: none"> <li>❖ Actual Damages</li> <li>❖ Liquidated Damages</li> <li>❖ Statutory Penalties</li> <li>❖ Attorneys' Fees</li> </ul>	<ul style="list-style-type: none"> <li>❖ Civil Penalties</li> <li>❖ Attorneys' Fees</li> </ul>
Personal Liability?	<ul style="list-style-type: none"> <li>❖ If inadequate adherence to corporate formalities</li> <li>❖ Potentially</li> </ul>	<ul style="list-style-type: none"> <li>❖ If inadequate adherence to corporate formalities</li> <li>❖ Any person who "causes" the violation to occur</li> </ul>	<ul style="list-style-type: none"> <li>❖ If inadequate adherence to corporate formalities</li> <li>❖ Any person who "causes" the violation to occur</li> </ul>

# Most Common Types of Claims



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# Unpaid Wages/Overtime

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- Employees must be compensated for all hours worked.
- Any work performed by an employee in excess of eight hours in one day, or in excess of 40 hours in any workweek, must be compensated at a rate of no less than one and one-half times the regular rate of pay for an employee. (Lab. Code, § 510(a); Wage Order No. 4-2001, § 3.)

# Unpaid Meal Period Premiums

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- An employee who works more than five hours per day is entitled to receive a timely, uninterrupted meal period of at least 30 minutes. (Lab. Code, § 512(a); Wage Order No. 4-2001, § 11.)
- If an employer fails to provide an employee the opportunity to take a timely, uninterrupted meal period of at least 30 minutes, the employer must pay the employee one additional hour of pay at the employee's base hourly rate of compensation for each workday that a meal period is not provided. (Lab. Code, § 226.7(c).)
- Employers must authorize and permit all employees to take rest periods, during which the employer must not require the employee to work. (Lab. Code, § 226.7; Wage Order No. 4-2001, § 12.) The authorized rest period must be based on the total hours worked daily, at the rate of ten minutes net rest time for every four hours worked or major fraction thereof. (Wage Order No. 4-2001, § 12.)

# Unpaid Rest Period Premiums

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- Similar to meal breaks, if an employer fails to provide an employee the opportunity for a rest period, the employer must pay the employee one hour of pay at the employee's base hourly rate of compensation for each workday that the rest period was not provided. (Id.) Unlike meal periods, employees are not required to record their rest periods. (Wage Order No. 4-2001, § 7.)
- Although employers must authorize meal breaks and rest breaks, employers are not required to police meal breaks. (Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1005.)
- If an employer's records do not show a meal period for a given shift over five hours, however, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. (Id. at 1053.)

# Improper Wage Statements

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- Pursuant to Cal. Labor Code section 226(a), all paystubs must include the following:
  - (1) gross wages earned, (2) total hours worked, (3) the number of piece-rate units earned and any applicable piece rate, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.
- If an employer knowingly and intentionally fails to provide accurate wage statements, employees may recover a \$50 penalty for the initial violative pay period, and \$100 for each subsequent violative pay period, not to exceed \$4,000. (Lab. Code, § 226(e)(1).)

# Waiting Time Penalties

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- If an employee is involuntarily discharged, employers must pay all due and unpaid wages immediately. (Lab. Code, § 201.)
- If an employer willfully fails to pay wages due to an employee who quits or was discharged, the employee's wages continue as a penalty until paid, for up to 30 days. (Lab. Code, § 203.)

# New Legislation and Case Law



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# Legislative Update

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Penal Code section 487m (AB 1003)

- Intentional theft of wages (including gratuities) in an amount greater than \$950 from any one employee or \$2,350 in the aggregate from two or more employees in any consecutive 12-month period may be punished as grand theft.

Labor Code section 90.8 (SB 572)

- Authorizes the Labor Commissioner to obtain a real property lien to secure amounts due to the Labor Commissioner under any final citation, hearing, or decision.
- The lien will exist for up to 10 years, and the Labor Commissioner must release the lien upon payment of the amount owed, including any interests and costs that lawfully accrued on the original amount owed.

# Class Actions

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## *Castillo v. Bank of America, NA*

- Predominance was not satisfied where large portion of proposed class was not exposed to purportedly improper overtime formula or otherwise injured by it

## *Wilson v. La Jolla Group*

- A claim of misclassification as an independent contractor does not alone compel a finding of predominance at the certification stage. The underlying violations affecting the would-be employees must also be supported by common proof

# Class Actions

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*Olson v. Lyft* (2020) 56 Cal.App.5th 862

- A 2018 U.S. Supreme Court decision that blessed class action waivers in arbitration agreements did not override California precedent that deemed waivers of Private Attorneys General Act claims unenforceable

*Bernstein v. Virgin America, Inc.* (9th Cir. 2021) 990 F.3d 1157

- Employers are not subject to heightened penalties for subsequent violations of PAGA until they have been notified of prior violations by either a court or the California Labor Commissioner

# PAGA

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## *Wesson v. Staples the Office Superstore, LLC*

- Trial courts have the inherent authority to ensure a plaintiff's claim under PAGA will be manageable at trial, which includes the authority to strike those PAGA claims that cannot be rendered manageable.

## *Johnson v. Maxim Healthcare Services, Inc.*

- An employee whose individual claim is time-barred still has standing to pursue a representative claim under PAGA.

## *Amaro v. Anaheim Arena Management, LLC*

- The Court of Appeal agreed that the release clause was overly broad because it applied to claims outside the scope of the lawsuit. The court remanded the case to determine whether the release can be narrowed sufficiently for the settlement to survive.
- The panel rejected the additional claim that the employer engaged in an improper “reverse auction” by settling with one plaintiff for the lowest possible amount after failing to come to terms with the plaintiffs in the other lawsuits.

# Regular Rate

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*Clarke v. AMN Servs., LLC*

- Per diem payments that function as remuneration for hours worked rather than reimbursement for expenses should be included in the regular rate.

# Meal and Rest Periods

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## *Donohue v. AMN Services, LLC*

- Rounding policies cannot be applied in the meal period compliance context.
- Time records showing non-compliant meal breaks may raise a rebuttable presumption of meal break violations.

## *Ferra v. Loews Hollywood Hotel, LLC*

- Premium pay for meal and rest break violations must retroactively be paid at the same “regular rate of pay” used to calculate and pay overtime premium wages.

# Arbitration Agreements

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## *Chamber of Commerce v. Bonta*

- Addresses enforceability of AB 51 as it relates to mandatory arbitration provisions.

## *Lange, Gerald v. Monster Energy Company*

- Cautions against arbitration agreements that are “permeated with unconscionability.”

# Arbitration Agreements

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*Jarboe, Thomas v. Hanlees Auto Group, et al*

- Defendants moved to stay the entire action and compel arbitration based on the arbitration clauses in Plaintiff's initial employment application and agreement.
- A trial court has broad discretion to deny a request to stay a PAGA claim pending the arbitration of any individual claims.

*Viking River Cruises, Inc. v. Moriana*

- \*\*CURRENTLY PENDING\*\*
- Question Presented: Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under the California Private Attorneys General Act.

# Best Practices to Mitigate Liability



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# Best Practices to Mitigate Liability

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- Consider arbitration agreement with waiver of class and representative actions
- Track and pay time to the minute (do not round time)
- Audit policies to ensure compliance
- Audit payroll
- Consider changing pay periods to mitigate liability
- Consider following up with employees when meal violations occur
- Consider paying premiums for meal and rest breaks
- Change compensation plans to reduce regular rate of pay issues
- Hold training on wage and hour compliance with managers and employees

# Questions?

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