



## Why PAGA still matters

### PAGA IS WORTH FIGHTING TO PROTECT BECAUSE IT PROTECTS THE WORKING PEOPLE OF CALIFORNIA

PAGA is a frequent target of criticism, but now we are seeing the most credible threat yet. Every year, at least a half dozen bills are brought that seek to gut or lessen the impact of PAGA. In recent years, employers have been using the California proposition system to gut laws aimed at curbing wage theft. For example, famously, Prop 22 took away workplace protections for app-based drivers. In 2018, voters agreed to strip away the rights of ambulance drivers to take breaks. In 2024, voters will decide the fate of PAGA. We need to work together to protect and maximize the effectiveness of PAGA in combating wage theft.

#### Private attorneys doing the work of the State

The Private Attorneys General Act of 2004, California Labor Code sections 2698, et seq. (“PAGA”) is a mechanism for an employee to take on the same role as the California Labor and Workforce Development Agency (the “LWDA”) in collecting civil penalties, i.e., a monetary fine. The statutory purpose of PAGA is to punish employers who engage in labor violations and deter employers from engaging in unlawful conduct from the start. (Punitive damages are rarely if ever allowed in these types of cases. See *Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1252.)

The California Legislature enacted PAGA because there was inadequate funding for state agencies to enforce labor laws. PAGA is a mechanism to disincentivize employers from engaging in unlawful and anti-competitive business practices. The Legislature believed PAGA would stand as a meaningful deterrent. At the time, staffing levels at enforcement agencies was on the decline and private enforcement was viewed as necessary.

Through PAGA, workers have the right to litigate in the same way as the LWDA. Civil penalties were only collectable by the LWDA prior to its enactment, but under PAGA civil litigants are deputized to collect civil penalties for

the state. The only remedy currently available under PAGA is civil penalties. No other remedies, including unpaid compensation, interest, statutory penalties, or injunctive relief are available under PAGA. (*ZB N.A. v. Superior Court* (2019) 8 Cal.5th 175, 182.)

A PAGA action is not a dispute between an employee and an employer, but rather a dispute between the state and the employer, being enforced by aggrieved employees. Prior to filing a civil action, PAGA requires that the employee give written notice describing the alleged Labor Code violations to both the employer and the LWDA. This gives the state a chance to decide whether to investigate the claims and, in some instances, employers a chance to cure violations.

#### The current threat to PAGA

On the November 2024 ballot an initiative to gut PAGA will be presented to California voters. The initiative, entitled “Eliminates Employees’ Ability to File Lawsuits for Monetary Penalties for State Labor Law Violations” seeks to send enforcement of California’s wage laws through the assessment of civil penalties back to the Labor Commissioner’s office. The title is a small boon, but the threat of passage is real. Remember that app-based companies spent over \$200 million in support of Prop 22.

Helpful is the finding by the California Legislative Analyst and Director of Finance that the initiative would increase state costs to enforce labor laws more than \$100 million per year. The state will also lose the revenue generated by civil PAGA actions. A 2020 study by the UCLA Labor Center (“*California’s Hero Labor Law*”) reported that in 2019, the state collected over \$88 million in PAGA civil penalties. The same study found from 2016-2019, the state collected over \$165 million through PAGA.

The initiative’s proponents, Californians for Fair Pay and Accountability, argue: (a) most California

employers are law abiding; (b) the system needs to be streamlined so employees can quickly receive what is due; (c) small businesses need to be protected from shakedown lawsuits; (d) courts are backlogged; and (e) attorney’s fees are too high. The executive committee of the CFPA is unsurprisingly led by employer associations. As civil rights advocates, it is vital that we talk to our families, friends, and colleagues about the importance of protecting PAGA. An understanding of where these employer associations have missed the mark is important to have dialogues about challenging the initiative.

#### Wage theft is epidemic

In 2021, the California Legislature passed AB 1003, which further criminalized wage theft. The law, codified at Penal Code section 487m, created a new criminal offense for the intentional theft of wages by an employer, punishable as either a felony or a misdemeanor. In a 2021 study, the Economic Policy Institute (“EPI”) found that between 2017 and 2020, more than \$3 billion in wages were recovered on behalf of workers in the United States. CalMatters reported in a 2022 article *When Employers Steal Wages from Workers*, employees in California “lost nearly \$2 billion from not being paid the minimum wage in 2015....” In a 2014 report, the EPI found that wage theft was arguably the top of property crimes.

Also keep in mind that employers that commit wage violations are engaging in anti-competitive practices. Labor is the largest part of most businesses’ budget. By saving on labor costs, these companies can charge less and increase revenue. Meanwhile, businesses that follow the law have trouble competing with the lawbreakers.

#### The Labor Commissioner is backlogged

A CalMatters 2023 report, *Unpaid Wages: A Waiting Game*, found the Labor Commissioner is too short-staffed, particularly because of the general

labor shortage seen post-COVID. The CalMatter’s report cited officials from the state Senate budget committee who stated that nearly a third of positions within the Labor Commissioner office were vacant as of May 2022. California’s bipartisan oversight agency, The Little Hoover Commission, found in a 2015 study of California’s underground economy, that low wages compared to other civil servants and a slow hiring process hinder staffing at enforcement agencies.

### “Shakedown” lawsuit reports are anecdotal – but don’t give opponents ammunition

The UCLA Labor Center’s report *California’s Hero Labor Law* found no evidence of a flood of frivolous litigation or any empirical evidence that PAGA has a negative impact on California’s economy. The study found PAGA helped vulnerable workers fight wage theft and enhanced compliance among employers. UCLA Labor Center reports that 89% of PAGA actions concern wage theft.

Still, it is worth commenting that one of the ways we can beat back efforts to kill PAGA is to be careful about which claims are pursued. The lawsuits that are trotted out before the legislature that will likely be the centerpiece of the 2024 initiative usually involve what are viewed as “gotcha” violations. A prime example of this are violations of wage statement rules that require an employer’s name to appear on the paystub. A missing period or comma is a violation, but does a lawsuit centered on this advance the rights of California’s workers? Take a beat and consider how the violations in a lawsuit will look in a PAGA attack ad.

As to bogged down civil courts, The UCLA Labor Center found only 0.27% of civil cases filed in 2018 were PAGA cases. Most of those cases settled short of a judgment.

### Attorney fees encourage counsel to represent vulnerable workers

Fee statutes are generally enacted in civil rights actions to encourage competent counsel to take on cases where

there is a risk the attorney will receive no compensation and wholly front all the costs. Without fee statutes, there would be a lessened incentive to take on contingency-based litigation on behalf of lower-wage workers. Market forces are at work and competent counsel need to be able to make a living. PAGA lawsuits further the objections of the California Legislature to penalize employers who engage in unlawful labor practices and fee awards further encourage employers to adhere to the law.

One of the main arguments of the anti-PAGA faction is that attorneys in these suits take away a large percentage of the amount recovered. After 75% of the civil penalties are paid to the state and attorney fees and costs are paid, little is recovered by the average aggrieved employee. While the aims of PAGA are to punish and deter, the optics here can be negative.

### What’s unique about PAGA

PAGA aids in enforcement of labor violations with a variety of tools not available in other types of anti-wage theft actions.

#### ***The representative plaintiff does not need to have suffered all the same violations as the other aggrieved employees***

An ‘aggrieved employee’ – a person affected by at least one Labor Code violation committed by an employer – [may] pursue penalties for all the Labor Code violations committed by that employer.” (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 751.) Since “[t]he plaintiff is not even the real party in interest in the action – the government is ...it would be arbitrary to limit the plaintiff’s pursuit of penalties to only those Labor Code violations that affected him or her personally.” (*Id.* at 757.)

#### ***Class action procedures do not apply***

Because PAGA allows a representative plaintiff to recover civil penalties on behalf of the state, “[a] PAGA representative action is ... a type of *qui tam* action.” (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348,

382.) Therefore, statutory class action requirements are not applicable to PAGA claims. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 975.)

#### ***PAGA provides an avenue for enforcing nearly all labor statutes***

Many statutes enforceable through PAGA have no private right of action. That means that only an administrative agency can enforce those laws. Examples of this are misappropriation of tips and misclassification of employees as independent contractors. (See *Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 594; *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 337-338.) PAGA gives workers an additional avenue to enforce these laws as they stand in for the state.

### Latest trends

Because of its unique nature, appellate courts are frequently called upon to interpret the PAGA. Practicing in this area requires constant attention to evolving legal precedent.

#### ***Individual PAGA claims can be compelled to arbitration***

Federal Arbitration Act (“FAA”) preemption does not require an employee to waive their entitlement to pursue representative claims on behalf of the state for PAGA civil penalties. (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1922-23.) However, the FAA does preempt prior California precedent precluding enforcement of an arbitration agreement that separates a plaintiff’s “individual” PAGA representative claim (seeking penalties on behalf of the state for Labor Code violations personally experienced by the plaintiff) from her “non-individual” PAGA representative claim (seeking penalties for violations affecting other employees) and requires arbitration only of the “individual” PAGA claim. (*Id.* at 1924.)

#### ***The standing of representative plaintiffs compelled to arbitration is under review***

The California Supreme Court is currently reviewing a lingering issue from the *Viking River* decision relating

to the definition of standing under PAGA. (See *Adolph v. Uber Technologies, Inc.*, S274671.) The question presented is whether standing remains to pursue PAGA claims on behalf of other aggrieved employees. The interpretation of standing under PAGA by the California Supreme Court is at odds with the U.S. Supreme Court's own interpretation in *Viking River*. In the meantime, California trial courts are generally staying the civil court representative action pending the outcome of *Adolph*.

**Whether there is a “manageability” requirement is under review**

In 2021, the Second District held that trial courts have the inherent authority to strike PAGA claims found to be unmanageable. (*Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, 756.) However, in 2022, the Fourth District found a manageability requirement would interfere with PAGA's purpose as a law enforcement mechanism to place an extra hurdle that is not placed on the state by requiring proof of manageability. (*Estrada v. Royalty Carpet Mills* (2022) 76 Cal.App.5th 685, 713.) The Fourth District still cautioned that courts may limit the amount of evidence allowed to be presented and lower penalties as a means of encouraging plaintiffs to show widespread violations in an efficient and reasonable manner. (*Ibid.*) The California Supreme Court granted review of *Estrada*, but interestingly, did not depublish it.

**PAGA trials are bench trials**

PAGA actions are not subject to jury trials because they are substitutes for administrative proceedings and the statute is subject to a variety of equitable factors. (*LaFace v. Ralphs Grocery Store* (2022) 75 Cal.App.5th 388, 400-402.)

**A trial court may stay PAGA actions where multiple actions are pending**

The doctrine of exclusive concurrent jurisdiction authorizes trial courts to stay one or more PAGA actions where multiple PAGA actions covering the same claims are pending. (*Shaw v. Superior Court* (2022) 78 Cal.App.5th 245, 251.)

**“Subsequent” penalties are not available in every case**

To assess “subsequent” penalties, the plaintiff needs to present evidence that the Labor Commissioner or a court notified the employer it was in violation of the Labor Code. (*Gunther v. Alaska Airlines* (2021) 72 Cal.App.5th 334, 356.)

**PAGA releases must be limited in scope**

The Fourth District reversed an order granting final approval to class and PAGA settlement because the scope of the release was overbroad in that it covered “potential claims ... in any way relating to the” facts pled in the complaint. The court found that the “in any way relating” language caused the release to unreasonably extend to claims that could only be tangentially related to the allegations in the operative complaint. (*Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

**There is generally no right to object to or appeal from PAGA settlements**

Non-representative aggrieved employees have no right to object to or appeal the approval of PAGA settlements. (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 81-82; *Callahan v. Brookside Senior Living Communities, Inc.* (9th Cir. 2022) 42 F.4th 1013, 1023-1024; *Saucillo v. Swift Transportation* (9th Cir. 2022) 25 F.4th 1118, 1126-1127.)

**What rights a PAGA representative plaintiff has in a related action is under review**

The California Supreme Court is currently reviewing whether a plaintiff in a PAGA action has the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state. (See *Turrietta v. Lyft, Inc.*, S271721.)

**Resolution of individual non-PAGA claims does not give rise to claim preclusion**

An employee who settles individual claims against an employer for alleged Labor Code violations is not subsequently barred by claim preclusion for bringing a PAGA enforcement action for the same

Labor Code violations when, prior to settlement, the employee could have added the PAGA claims to the existing action. (*Howlson v. Evans Hotels, LLC* (2022) 81 Cal.App.5th 475, 481-482.)

**A loss in arbitration on individual non-PAGA claims does not extinguish PAGA remedies**

A PAGA representative is “acting in different capacities and asserting different rights.” (*Gavriloglou v. Prime Healthcare Management* (2022) 83 Cal.App.5th 595, 598.)

**The relation-back doctrine can apply**

The relation-back doctrine can apply if the claims in an amended PAGA complaint rest on the same general set of facts, involved the same injury, and referred to the same instrumentality as the claims in the original complaint. (*Hutchenson v. Superior Court* (2022) 74 Cal.App.5th 932, 936.) The mere fact that the new employee's PAGA notice was submitted after the first employee's PAGA notice does not bar the application of the relation-back doctrine.

**Don't lose this important tool**

We have an important tool here to combat unfair labor practices and outright theft of wages. The mechanism for punishing and deterring this unlawful behavior largely falls to statutory and civil penalties. The reasons PAGA was enacted have not abated – wage theft and related wage violations are still rampant and the LWDA does not have the capacity to handle the volume. Competent private counsel play a vital role in bringing meritorious cases to hold employers accountable. While there is room for improvement, we cannot let this important deterrent slip away. Stay up on the latest challenges in practicing in this area. Most importantly, bring cases that materially advance employee protection.

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