



Settlement of PAGA cases

PAGA: Still an effective way to address labor code violations as traditional wage-and-hour class actions become more rare

By **DAVE RUDY**

Representative wage-and-hour litigation has recently undergone significant change. While Private Attorneys General Act (PAGA) claims have typically been included in wage-and-hour class actions, PAGA was rarely at the center of the cases. Settlements often allocated relatively small amounts under PAGA and reserved the bulk of settlement to class members.

Since the California Supreme Court has followed the United States Supreme Court in sanctioning mandatory arbitration of individual and class claims¹, wage-and-hour class actions will become rare.² But the California Supreme Court has drawn the line at PAGA. The Court held unequivocally that enabling workers to act on behalf of the state is a matter of public policy and state law in California. The right to proceed in such civil actions cannot be waived, nor can an employee agree to an employer's demand that such claims must be arbitrated pursuant to employment agreement.³

Thus, there remains an effective avenue of representative litigation as a means to redress violations of the labor code. The Court made certain that there is still an available and effective remedy even in cases where individual claims are not large enough to justify litigation by the individuals themselves⁴

Brief summary of PAGA

The Private Attorneys General Act of 2004 (Labor Code, §§ 2698-2699.5) provides that an aggrieved employee can recover civil penalties on behalf of present and former employees as a private attorney general on behalf of the California Labor and Workforce Development Agency (LWDA). The primary threshold requirement is that the Plaintiff has given

notice to LWDA, and either the State agency has responded with notification that LWDA does not intend to pursue the claim, or has not responded within the statutory period, at which point Plaintiff(s) may file suit. Seventy-five percent of any civil penalties recovered by settlement or judgment must be paid to LWDA and 25 percent collectively to the employees on whose behalf the action is maintained. Penalties recoverable are either specified in the particular statutes that provide for them or PAGA provides default penalties of \$100 per employee per pay period for the first violation, and \$200 for subsequent violations (less for very small employers). The penalties may be reduced in the discretion of the trial court if the award would otherwise be unjust, arbitrary, oppressive or confiscatory.

Notably, PAGA also allows for recovery of wage claims as a civil penalty which is payable solely to Plaintiff⁵, and not to LWDA.⁶

Court approval

Court approval is required by statute for every PAGA settlement.⁷ At first glance, this requirement seems to be one that class action lawyers (on both sides) are accustomed to. However, PAGA judicial oversight is strikingly different from that for class actions.⁸ The Court is not called upon to exercise the level of scrutiny typically required in a class action.⁹ For example, PAGA approval requires none of the various findings required by Rule 23 or CCP, § 382 and case law. Indeed, the entire pre-settlement judicial process and Court involvement in class actions is essentially missing in PAGA cases. For example, there is no certification process or order, which frequently dominates most of the pre-settlement life of a typical class action.

This leads to a tremendous advantage in PAGA cases as compared to wage-and-

hour class actions. Instead of being dominated by class certification requirements, discovery can now be focused on damages. Ostensibly, cases can be ready for settlement discussions much earlier and in a much more cost-effective manner.

Settlement issues

We have observed that PAGA provides the opportunity to allow more rapid and focused damage-based discovery. A beneficial consequence is that PAGA cases ought to be amenable to resolution more quickly than wage-and-hour class actions. What happens, on the other hand, when a PAGA action is coupled with substantial individual claims? The individual claims are likely to be sent to arbitration first, with a stay of the representative action until the arbitration is concluded. So the PAGA advantage of quick evaluation and early potential resolution will likely be precluded in cases where individual claims are substantial.¹⁰

PAGA also presents a host of settlement-related questions which are potentially difficult, mainly because they have not yet been addressed by appellate courts. Even when plaintiffs' (or defense) lawyers are not pleased with particular published court outcomes, the decisions do provide guidance as to the "rules of the road." The absence of precedent can be much more challenging than the presence of even undesirable guidance from the judiciary.

In handling and settling class actions – as distinct from PAGA – the body of Federal and California case law is helpful to practitioners on all sides in putting the nuts and bolts of settlement together. Established and approved methodologies help to ensure the collateral estoppel that Defendants need to make settlement agreements in representative actions, to protect non-parties whose rights are



affected, to give guidance to the trial Court in deciding whether to approve proposed settlements, to assist in determining disposition of unclaimed damages, and the like.

With PAGA settlements, on the other hand, the procedural (and logistical) aspects of settlement are not yet well-defined by the case law. Many questions are open with respect to PAGA settlements. By way of example, here is a partial list of questions as to which we have much more guidance in the class-action arena than under PAGA:

- What are the requirements for notice of settlement, and how and when is notice to be accomplished?
- Are the non-party employees entitled to notice of, and to appear and be heard at, the hearing for Order approving a settlement?
- Is a Court-approved settlement agreement and order, incorporated into the final judgment, sufficient to bind non-party employees with respect to civil penalties, or is a stipulated judgment required?
- Is distribution of the employee portion to be made on an opt-in or opt-out basis, or must it be distributed to all non-party employees pro rata?
- Does *cy pres* apply – what do we do with issues of reversion, uncashed checks, etc.?
- Are *any* incentive payments to named Plaintiffs allowed?
- What is the extent of the trial Court's role in approving a proposed settlement? What constitutes abuse of discretion? How strong is the Court's independent duty to thoroughly analyze the settlement independent of the parties?

It is not surprising that there is a paucity of law on these issues. For years, PAGA claims have been essentially a tag-on or small component of wage-and-hour class actions. As a result, there are very few cases dealing with substantive issues relating to PAGA claims as stand-alone representative actions. Most of the recent decisions have dealt with such issues as PAGA and the FAA vs. public policy of

California, arbitrating individual claims while the representative action(s) are stayed, the “death knell” doctrine and its application to PAGA individual vs. representative cases¹¹, and other cases dealing with integrating the new PAGA stand-alone cases into the general wage-and-hour arena.

This writer finds no case squarely dealing with substantive, PAGA-only issues such as settlement approval protocol, due process considerations for absent affected employees, and the like. It is probable that class-action legal precedent will apply to some extent by default to some of these issues. But because PAGA cases are not Rule 23 or § 382 cases, much of the analysis may well be different. With respect to due process concerns, for example, class-action cases are likely to be quite instructive. On the other hand, it will certainly be argued that PAGA trial Courts do not have nearly the breadth of independent duty as class-action Courts in managing and monitoring all aspects of the litigation, from certification to settlement.

It is clear that a PAGA judgment is binding on all of the present and current employees who are included in the defined PAGA claim(s)¹² as well as on government agencies¹³. While a final judgment will operate in the employer's favor to collaterally estop subsequent civil penalty claims¹⁴ made by any employee whose civil penalties were at issue in the PAGA action, the effect of an agreed (even Court-approved) PAGA settlement on absent aggrieved workers is still not the subject of clear judicial authority.¹⁵ In class actions, however, because due process concerns have been extensively litigated and many issues resolved by reported opinions, we have much more certainty and stability in the effectiveness and legality of various settlement options.

Until the law is clarified, best practice may be for lawyers on both sides to insist on more conservative approaches to settlement issues – that is, on approaches

more protective of the longevity and finality of the settlement agreement.

The involvement of experienced class action settlement administrators is undoubtedly wise. These professionals can provide the knowledge and experience that ensures that due process is protected, best efforts are used to reach non-party employees and notice is effective. They also will continue to provide invaluable assistance in assuring the Court (as necessary) that settlement administration will be effective and protect the rights of all.

What the future holds

Recent changes have made PAGA more favorable to employers, and it appears that further similar changes may be in the pipeline. In October 2015, the Governor signed legislation amending PAGA. Employers now have an opportunity to cure wage statement violations and avoid PAGA liability.¹⁶ These violations appear to be quite commonplace and widespread. The effect on all PAGA claims statewide could be extensive.

The likelihood of more dramatic changes may be inferred from the Governor's budget proposal last month, which proposes funding for a new PAGA enforcement unit and seeks to give the state notice and an opportunity to object to any proposed PAGA settlement.¹⁷

As class actions become far less frequent in the wage-and-hour arena, PAGA cases will more and more often take their place. Judicial decisions will in due course become more frequent as well, with the Courts providing more precise answers to many of the open questions we now face. Because of the strong public policy of California, articulated boldly in the *Iskanian* case, we can expect PAGA to remain a vehicle for resolution of worker claims.¹⁸ Those individual claims which may not be economically feasible to pursue will often be remediable in a representative action.

Settlement issues must, for now at least, be carefully analyzed and addressed case by case.



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Rudy

number of employees other than plaintiffs. Case law permits the maintenance of both individual and representative claims by the plaintiffs in the same action: the individual wage claims are recoverable as PAGA claims, but without paying any portion of these wage claims to the Labor and Workforce Development Agency (LDWA). Arbitration remains a challenging issue in those cases, however. See *n 6, infra*.

⁵ Although there is an unresolved question which claims (\$558 for example) are paid to Plaintiff, and which to the aggrieved employees. In any case, LDWA is not a payee.

⁶ Before *Iskanian*, the law was clear that individual wage claims were part of PAGA claims, even though paid 100% to the individual employees. See, *Thurman v. Bayshore Transit Management, Inc., et al* (2012) 203 Cal.App.4th 1112 at 1152-54. After *Iskanian*, however, several appellate decisions have severed representative from individual claims, compelling arbitration of the latter while staying the former until conclusion of the arbitration. See, e.g., *Franco v Arakelian* (2015) 234 Cal.App.4th 947.

⁷ Cal. Labor Code, § 2699(l)

⁸ See *Arias v Superior Court* (2009) 46 Cal.4th 969 for a detailed discussion and holding that PAGA actions are not subject to class action requirements.

⁹ Even the language of the statute suggests a more limited inquiry. The statute requires the Court to review not the entire settlement, but only "any penalties sought as a part of a proposed settlement agreement..." As discussed below, however, best practice may be to ask the Court to approve the entire settlement, at least until further appellate clarification. Trial Court Judges tend to regard that as their role, as well.

¹⁰ With less substantial individual claims, the tactical decision may be made by Plaintiffs to forego individual claims to get to

faster resolution. Or, might individual claims be pleaded in a separate action, stipulated to be arbitrated without affecting the PAGA litigation?

¹¹ For an interesting twist, see *Miranda v Anderson* (2015) 241 Cal.App.4th 196.

¹² *Arias v Superior Court* (2009) 46 Cal.4th 969, 986: "Because an aggrieved employee's action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government."

¹³ *Arias, supra, at 985.*

¹⁴ *N.B.*, non-party aggrieved employees are not precluded from later bringing wage claims including statutory (as distinct from civil) penalties, since those individual claims were not litigated in the representative action.

¹⁵ In the interim, employers may insist on a judgment to have full collateral estoppel protection against future civil penalty claims by aggrieved employees.

¹⁶ AB 1506.

¹⁷ <http://blogs.orrck.com/employment/2016/01/26/what-can-brown-do-for-paga-budget-proposal-seeks-greater-oversight-of-paga-claims/>

¹⁸ The United States Supreme Court has yet to decide whether *Iskanian* is compatible with or preempted by the Federal Arbitration Act. The Ninth Circuit has adopted *Iskanian*, but by a divided panel with a vigorous dissent. See, *Sakkab v Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3rd 425. Only time will tell for sure. ☹

Endnotes

¹ *Iskanian v CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348

² Class actions are still available in select cases where the arbitration/waiver provision of individual or representative claims is unconscionable, or where there is no such provision in the employment agreement.

³ *Iskanian, supra.*

⁴ There are also cases where monetarily significant individual claims are coupled with Labor Code violations which affect a