



# PAGA procedural amendments

*Same statute, new requirements for Labor Code violations*

BY LISA MAK

The Private Attorneys General Act (“PAGA”) of the California Labor Code allows aggrieved employees to file representative lawsuits to recover civil penalties on behalf of themselves, other aggrieved employees, and the State of California for Labor Code violations. Enacted in 2004, the purpose of PAGA was to increase enforcement of the Labor Code by “deputizing” citizens to act as private attorneys general and allowing them to pursue civil penalties on behalf of the State. This private enforcement mechanism was meant to help address the reality that labor enforcement agencies could not keep up with the growth of the labor market and the number of Labor Code violations occurring in workplaces.

In order to bring a valid PAGA claim, the employee has to meet the formal notice and waiting requirements specified under Labor Code section 2698, *et seq.* This involves submitting a PAGA claim notice to the Labor and Workforce Development Agency (“LWDA”) and giving the agency time to review the notice and decide whether it wishes to investigate the claim. Within a specified time period, if the LWDA chooses not to investigate, or does not otherwise respond to the claim notice, the claimant employee is then entitled to bring a PAGA lawsuit in court. Any civil penalties recovered from an employer in a PAGA action are divided with the LWDA, with the agency receiving 75 percent and the aggrieved employees receiving 25 percent. Attorneys’ fees can also be recovered for successful PAGA claims.

## PAGA creates leverage for plaintiffs

In recent years, PAGA has been a useful tool for plaintiffs to file lawsuits on behalf of a group or “class” of employees who have suffered Labor Code violations, such as unpaid wages, missed meal and rest breaks, non-compliant wage statements, and overtime violations. PAGA claims can be added to traditional class action lawsuits, or stand alone as a “PAGA only” representative action. The ability to recover large civil penalties and attorneys’ fees from employers can create important leverage in PAGA cases. Plaintiffs can also potentially conduct broader discovery in PAGA cases due to the representative nature of such claims.

A major benefit of PAGA actions is that plaintiffs do not need to satisfy the strict and often onerous class-certification requirements of traditional class actions. This was decided under the 2009 California Supreme Court case of *Arias v. Superior Court*. Furthermore, California courts have held that PAGA claims cannot be waived under an arbitration clause, even though other types of class actions can be waived.



In the 2014 case of *Iskanian v. CLS Transportation Los Angeles LLC*, the California Supreme Court held that an employee’s waiver of a representative PAGA claim in an arbitration clause of an employment contract was unenforceable, as it was contrary to public policy given that a PAGA dispute is between the employer and the State. *Iskanian* also held that such a rule prohibiting waiver of a PAGA claim in an arbitration agreement was not preempted by the Federal Arbitration Act. The *Iskanian* rule was reinforced in the recent case of *Hernandez v. Ross Stores*, in which the Fourth District Court of Appeal held that an employer cannot compel an employee to arbitrate individual aspects of his PAGA claim while maintaining the representative PAGA action in court. Thus, even with the increased difficulties of certifying employment class actions and the proliferation of forced classwide arbitration clauses, PAGAs remain a viable and powerful way to hold employers accountable for large-scale Labor Code violations.

Last year, as part of Governor Jerry Brown’s approved budget, the California legislature passed SB 836, which made some important procedural amendments to PAGA. The bill became effective on June 27, 2016, and was part of Governor Brown’s plan to increase oversight and enforcement of PAGA



claims by the LWDA. Practitioners should be mindful of meeting these new procedural requirements in PAGA cases.

### New filing requirements for PAGA claims

The amendments require PAGA documentation to now be filed online, along with the implementation of new filing fees.

New PAGA claim notices now must be filed online on the Department of Industrial Relations (“DIR”) website, with a copy of the claim notice sent by certified mail to the employer.

Due to the enactment of AB 1506 in 2015, an employer has 33 days from the filing of a PAGA claim to “cure” certain defects on wage statements (e.g., the legal name of the employer, the dates of the pay period). The amendments now require that all employer cure notices or other responses to a PAGA claim must also be filed online, with a copy sent by certified mail to the aggrieved employee or his or her representative.

There is now a \$75 filing fee for a new PAGA claim notice and any initial employer response to a PAGA claim, including cure notices. Previously, the filing fee was \$3. The filing fee may be waived if the party is entitled to *in forma pauperis* status. As of now, the LWDA does not have an online payment system to process filing fees, so the fees should be paid by check, made out to the LWDA, and sent by regular mail to the DIR office in San Francisco.

### Review time for PAGA claims

The amendments have increased the time for the LWDA to review an employee’s PAGA claim notice and for an employee to file a PAGA lawsuit.

Previously, the LWDA had 30 days to review an employee’s PAGA claim notice to decide whether to investigate the claim. The time for the LWDA to review such a notice has now been extended from 30 days to 60 days. If the agency investigates the claim, it has 120 days to issue citations to the employer.

For PAGA claims filed on or after July 1, 2016, the LWDA may also extend its deadline to issue citations to employers to up to 180 days, as opposed to 120 days.

Previously, a plaintiff could not file a civil PAGA lawsuit until 33 days after sending the claim notice to the LWDA. This occurs when the LWDA notifies the plaintiff that it does not intend to investigate the claim, or does not notify the plaintiff either way. Under the new rule, a plaintiff cannot file a civil lawsuit until 65 days after sending the claim notice to the LWDA. Note, however, that employers still only have 33 days to cure wage statement violations.

### Submission of litigation information to the LWDA

Finally, the amendments have created new requirements on the submission of court complaints and proposed settlements in PAGA actions to the LWDA. How the LWDA will use such information remains to be seen.

When a plaintiff files a new PAGA lawsuit in court, a file-stamped copy of the complaint must be provided to the LWDA within 10 days of filing the lawsuit.

Courts previously had to review and approve proposed settlements that included PAGA claims. That is still the case, although the amendments now make clear that court approval is required for settlement of a PAGA action regardless of whether the settlement includes an award of PAGA penalties.

A copy of the proposed settlement of a PAGA action must be provided to the LWDA at the same time that it is submitted to the court.

If there is a court judgment or any other order awarding or denying PAGA penalties, a copy of that judgment or order must also be provided to the LWDA, within 10 days after entry of the judgment or order.

While the amendments do add some extra time and cost for PAGA filings, those new requirements do not seem to create significant obstacles for plaintiffs,

especially in light of the high penalty amounts that could possibly be obtained from a PAGA action. Governor Brown had initially considered far more sweeping changes to the PAGA statute to “stabilize” the handling of PAGA cases. This had included requiring plaintiffs to provide more details in PAGA claim notices; allowing employers to request that the LWDA investigate a PAGA claim notice; and giving the Director of the DIR an opportunity to object to proposed PAGA settlements. The amendments ultimately passed, as described above, were much more modest. The amendments passed also did not include additional funding or the creation of a “PAGA Unit” for the LWDA to increase its oversight and involvement for claims, which means that PAGA enforcement actions will likely primarily remain with plaintiffs and their attorneys.

It remains to be seen what the impact, if any, of these amendments will be on PAGA claims enforcement by the LWDA and litigation by private plaintiffs in the courts. It is also uncertain whether the new requirements for submission of PAGA complaints and settlements to the LWDA will have any effect on the litigation and settlement process. In the meantime, practitioners should pay attention to these new requirements when filing and litigating PAGA claims.

*Lisa P. Mak is a trial attorney at Minami Tamaki LLP in the Consumer and Employee Rights Group. Ms. Mak has many years of experience representing employees across a broad range of employment disputes, including claims for discrimination, harassment, retaliation, defamation, and wage and hour violations. She is an active member of the California Employment Lawyers Association and has been selected as a Super Lawyers Rising Star since 2015. For more information, visit [www.minamitamaki.com](http://www.minamitamaki.com).*



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