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PAGA: Forging ahead

THE QUEST FOR CLARITY UNDER CALIFORNIA'S PAGA: RECENT RULINGS TO HELP YOU VALUE THE CASE

A speck on the horizon: The birth of the PAGA statute

When the California Private Attorneys General Act of 2004 ("PAGA") was enacted, it created a new frontier in the realm of California employment law. (Lab. Code, §§ 2698, et seq.) For most of the last fifteen years, PAGA claims were generally filed ancillary to class claims and were rarely independently litigated. In the last five years, however, standalone PAGA lawsuits have increased, in part, to avoid the preclusive bite of arbitration agreements. (*Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348.) This article builds upon our prior article, "Light, Camera, Representative Action," and aims to shed light on some of the developments in California wage-and-hour laws over the last year through the lens of the PAGA. We hope that these insights will help attorneys value their PAGA cases and navigate towards successful resolution.

Plotting the course: PAGA basics

The California Legislature enacted the PAGA in order to "maximize compliance with state labor laws." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.) The PAGA enables private citizens to step into the shoes of the State of California and act as private attorneys general in order to enforce the state Labor Code. Under the PAGA, a plaintiff employee (who complies with the statutory notice requirements) may commence a representative action to recover penalties on behalf of other "aggrieved employees" and the State of California. Although PAGA actions allow employees to seek collective relief, the traditional class action requirements are not applicable to PAGA claims. (*Arias*, 46 Cal.4th at 975.)

Under the PAGA, the penalties recoverable by an aggrieved employee are either: 1) the amount specified in the underlying Labor Code provision alleged to have been violated, or, if no penalty amount is specified, 2) the PAGA's default penalty of $100 per aggrieved employee for each initial violation, and $200 per aggrieved employee for each subsequent violation. (Lab. Code, §§ 2699(a) & 2699, subd. (f).) Seventy-five percent of all penalties recovered in a PAGA action must be distributed to the California Labor and Workforce Development Agency, while the remaining twenty-five percent is distributed to aggrieved employees. (Lab. Code, § 2699, subd.(i).) In addition, an aggrieved employee who prevails in a PAGA action is entitled to an award of reasonable attorney's fees and costs. (Lab. Code, § 2699, subd. (g)(1).)

Navigating the *de minimis* doctrine following the Starbucks cases

The de minimis doctrine finds its etymology in the Latin axiom "*de minimis non curat lex*" (the law cares not for trifles). (Jeff Nemerofsky, What Is A "Trifle" Anyway?, 37 Gonz. L. Rev. 315, 316 (2002).) In the wage and hour context, the principle has its roots in federal jurisprudence at a time when the "administrative difficulty of recording small amounts of time for payroll purposes" made it impractical to compensate employees for short and uncertain periods of time (e.g., a few seconds or minutes). (*Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1063; see also, *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680; 29 C.F.R. § 785.47.) Employers frequently rely on the de minimis doctrine as a defense to allegations of unpaid compensation or improper breaks.

For years, the applicability of the doctrine to state Labor Code claims remained uncertain. California employees can now thank Starbucks for clarifying the limits of *the de minimis* doctrine.

Troester v. Starbucks Corp.

In *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, the California Supreme Court declined to apply the de minimis doctrine to state law claims for unpaid wages. In *Troester*, the plaintiff alleged that he and other employees regularly spent approximately

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4-10 minutes working off-the-clock after their shifts in order to close the store. In response, Starbucks argued that the short amount of time employees spent performing these tasks was *de minimis*.

The Court rejected Starbucks' argument and declined to apply the *de minimis* doctrine. In its analysis, the Court emphasized that state wage and hour laws are "more protective than federal law." (*Troester,* 5 Cal.5th at 839.) The Court further noted that the *de minimis* doctrine should be applied only where doing so would be consistent with a statute's purpose. (*Id.* at 843.) After determining that the state Labor Code and wage order provisions at issue were part of a "regulatory scheme" which is "indeed concerned with small things[,]" the Court held that the *de minimis* doctrine did not excuse Starbuck's failure to compensate employees for the time worked after their shifts. (*Id. at* 844.)

Parting ways with federal jurisprudence, the *Troester* Court characterized the U.S. Supreme Court's decision in *Anderson v. Mount Clemens* as being stuck in the past and grounded in "the realities of the industrial world." (*Troester,* 5 Cal.5th at 846.) The Court explained that the "modern availability of class action lawsuits undermines to some extent the rationale behind a *de minimis* rule with respect to wage and hour actions[,]" since cases with small individual recoveries can be aggregated to "vindicate an important public policy." (*Ibid.*) The Court further observed that problems in recording employee time that existed when *Anderson* was decided 70 years ago could "be cured or ameliorated by technological advances that enable employees to track and register their work time." (*Ibid.*)

In addition, the Court emphasized that for many modern workers, "a few extra minutes of work each day can add up." (*Troester,* 5 Cal.5th at 847.) The Court observed that Mr. Troester sought payment for "12 hours and 50 minutes of compensable work over a 17-month period, which amounts to $102.67 at a wage of $8 per hour. That is enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares. What Starbucks calls '*de minimis*' is not *de minimis* at all to many ordinary people who work for hourly wages." (*Ibid.*)

While the *Troester* Court refused to apply the *de minimis* doctrine to the circumstances before it, it stopped short of ruling out its application in all potential state wage and hour cases, due to the "wide range of scenarios in which this issue arises." (*Troester,* 5 Cal.5th at 843.) Nevertheless, *Troester*'s reasoning significantly called into question the applicability of the *de minimis* doctrine.

Carrington v. Starbucks Corp.

Four months after *Troester*, California's Fourth District Court of Appeal issued its ruling in another case against Starbucks, and again refused to apply the *de minimis* doctrine to the employee's state-law claims. (*Carrington v. Starbucks Corp*. (2018) 30 Cal.App.5th 504.)

In *Carrington*, the plaintiff filed a PAGA action seeking penalties for meal-beak violations and derivative claims, based on Starbucks' failure to provide meal breaks to employees who worked shifts lasting "slightly more" than five hours (e.g., up to 5 hours and 15 minutes). (*Carrington*, 30 Cal.App.5th at 510-511 & fn. 16.) Starbucks' computer system automatically scheduled a meal break whenever an employee was scheduled to work longer than five hours; however, a problem arose when employees were scheduled to work five hours or less, but actually ended up working more than five hours, such that they should have received a meal break. Starbucks did not automatically pay meal-period premiums to employees who worked "slightly more" than five hours and did not receive a meal break.

Starbucks argued that the alleged meal break violations were *de minimis* and thus not actionable. (*Id. at* 521.) Applying *Troester,* the Court of Appeal rejected Starbucks' argument and held that the *de minimis* doctrine did not apply to the employees' meal break claims. The Court noted that *Troester* had recognized one of the main impetuses behind the *de minimis* doctrine in wage and hour cases as "'the practical administrative difficulty of recording small amounts of time for payroll purposes[,]'" and observed that there was "no indication of a practical administrative difficulty recording small amounts of time" on Starbucks' part. (*Id.* at 524.) "To the contrary," the evidence indicated that Starbucks' time records had "accurately reflected" employees' start and stop times, including the times that they punched in and out for meal breaks. (*Ibid.*)

Together, *Troester* and *Carrington* demonstrate an effort to push employers into the modern age and away from antiquated timekeeping practices whose use has outlived their time.

The road ahead: The fallout of the Starbucks de minimis cases

Troester and *Carrington* represent significant victories for California workers. Moving forward, employees can rely on these cases to dispose of arguments that small periods of time should be excluded as *de minimis*. Moreover, so long as liability is established, violations with modest damages can give rise to PAGA's specified statutory penalties.

While less discussed, *Troester's* analysis of employer rounding practices is also noteworthy. In *Troester*, the Court noted that a rounding practice must be consistent with the core statutory and regulatory purpose that employees be paid for all time worked. (*Troester*, 5 Cal.5th at 847.) Relying on this reasoning, plaintiffs' attorneys can argue that where an employer's rounding practice results in unpaid compensation to an employee, the employee qualifies as "aggrieved" for purposes of the PAGA. Arguably, a specific employee can be "aggrieved" under PAGA if he or she was underpaid due to the rounding practice, irrespective of the rounding practice's overall impact on the group as a whole. *Troester's* ultimate impact on employer rounding practices remains to be seen.

Murky waters: Classifying break premiums as penalties vs. wages

California Labor Code section 226.7 prohibits employers from requiring their employees to work during meal or rest periods. (Lab. Code, § 226.7.) If a required break is not provided, the employer must pay the employee "one

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additional hour of pay at the employee's regular rate of compensation," commonly known as a "break premium." (*Id*., §§ 226.7, subds.(b), (c).) For years, California courts and attorneys have grappled with whether these break premiums are properly classified as "wages" or "penalties" under California law.

This distinction between a "wage" and "penalty" has important repercussions. For example, California law imposes a one-year statute of limitations on statutory claims to recover "penalties," whereas a longer three-year period applies to other statutory claims, including claims for unpaid wages. (Code Civ. Proc., §§ 338, subd.(a) & 340, subd. (a); *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.) This distinction could also impact a plaintiff's ability to recover attorneys' fees, which are available in "any action brought for the nonpayment of *wages*" under Labor Code section 218.5, subdivision(a) (emphasis added).

In *Murphy v. Kenneth Cole Productions, Inc.*, the Court of Appeal considered whether meal break premiums were "wages" subject to a three-year statutory limitations period under Code of Civil Procedure section 338, subdivision(a). (*Murphy,* 40 Cal.4th 1094.) The Court found that the meal period premiums were properly characterized as a "wage," rather than a penalty, since the premiums were intended to compensate employees. (*Id.* at 1114.)

Five years later, in *Kirby v. Immoos Fire Prot., Inc.* (2012) 53 Cal.4th 1244, the Court of Appeal was determining a party's right to attorneys' fees and costs under Labor Code section 218.5, which permits recovery in "any action brought for the nonpayment of wages[.]" (Lab. Code, § 218.5.) Ultimately, the Court determined that break premiums were not wages for purposes of Labor Code section 218.5. The Court argued that it's reading of section 218.5 was not at odds with its decision in *Murphy*, distinguishing the "legal violation" which triggered the remedy (e.g., the meal-break violation), and the remedy itself (e.g., the break premium). (*Kirby,* 53 Cal.4th at 1257 ["To say that a section 226.7 remedy is a wage, however, is not to say that the *legal violation* triggering the remedy is nonpayment of wages."] (emphasis in original).)

Since *Murphy* and *Kirby*, courts have been inconsistent in their interpretations of whether break premiums constitute "wages" or "penalties." Several courts have relied on *Murphy* to find that a meal period violation constitutes a wage for purposes of statutes such as Labor Code section 203 (waiting time penalties for failure to pay "wages" due at the time of termination or discharge) and Labor Code section 226 (penalties for failure to provide accurate itemized wage statements). (See, e.g., *Finder v. Leprino Foods Co.* (E.D. Cal. Mar. 12, 2015) 2015 WL 1137151, at *3-*5 (collecting cases).) Other courts have reached the opposite conclusion – relying on *Kirby*. (See, e.g., *Jones v. Spherion Staffing LLC* (C.D. Cal. Aug. 7, 2012) 2012 WL 3264081, at *2-*9 (collecting cases).)

Recently, the Ninth Circuit Court of Appeal asked the California Supreme Court to clarify what constitutes a "wage" for purposes of California employment cases. (*Stewart v. San Luis Ambulance, Inc.* (9th Cir. Dec. 29, 2017) 2017 WL 6757543.) In *Stewart*, the plaintiff was an emergency medical technician who sued the defendant ambulance company for alleged meal-break violations and derivative claims, including, *inter alia*, a claim for wage-statement violations. The employee claimed that the employer's failure to list the employee's accrued meal-break premiums in his wage statements violated Labor Code section 226. The Ninth Circuit declined to answer whether meal-break premiums constituted "wages earned" under section 226, and instead asked the California Supreme Court to resolve the issue.

The California Supreme Court's decision in *Stewart* will likely have implications beyond Labor Code section 226. If the Court determines that break premiums are "wages," this could broaden the horizon for employees with respect to potential derivative claims that stem from alleged meal and rest break violations.

At a crossroads: Manageability in PAGA actions

With PAGA actions increasingly going to trial, defendants have attempted to challenge PAGA claims on the basis of manageability. In the class action context, California's Supreme Court has cautioned trial courts to consider whether litigation of individualized issues can be managed fairly and efficiently when determining whether a certified class action should proceed to trial. (*Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1.) However, the Court has also held that traditional class action requirements "need not be met" in PAGA actions (see *Arias,* 46 Cal.4th, *supra*), and the PAGA statute contains no language regarding a manageability requirement. (Lab. Code, §§ 2698, et seq.) Thus, plaintiffs' attorneys have argued that there is no manageability requirement for PAGA claims.

Federal district courts have split on the issue. (See, e.g., *Zackaria v. Wal-Mart Stores, Inc.* (C.D. Cal. 2015) 142 F.Supp.3d 949, 958["[T]he court finds defendant's manageability argument inconsistent with PAGA's purpose and statutory scheme"]; *Tseng v. Nordstrom, Inc.* (C.D. Cal. Dec. 19, 2016) 2016 WL 7403288, *5 [declining to impose a manageability requirement on PAGA claims in light of PAGA's purpose as a law enforcement action to benefit the public]; *but see*, *Ortiz v. CVC Caremark Corporation* (N.D. Cal. March 19, 2014) 2014 WL 117614, *3 [dismissing PAGA claim because individual issues made the action unmanageable].)

No controlling state law authority has established that manageability is a prerequisite for a PAGA claim. Many state trial courts have declined to impose a manageability requirement in PAGA cases. (See, e.g., *Rusom v Tissue Banks I* (Cal. Sup. Ct. Contra Costa Cty., Feb. 16, 2017), No. MSC15-01883, 2017 WL 1047145, *2 ["[t]here is no law in California that PAGA claims have to be 'manageable'"]; *Pickett v 99 Cents Only Stores* (Cal. Sup. Ct. Los Angeles, May 26, 2017) No. BC473038, 2017 WL 3837815,

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*3 [denying motion to strike PAGA claim as unmanageable, finding that a phased trial could address any manageability concerns].) However, other trial courts have reached the opposite conclusion, imposing a manageability requirement on PAGA claims. (See, e.g., *Khan v. Dunn-Edward Corp.* (Cal. Sup. Ct. Los Angeles Cty. Jan. 29, 2016) No. BC477318, 2016 WL 1243588, *1.)

Based on anecdotal experience and a recent symposium involving judges in California's complex court system, the judicial trend in California appears to be leaning away from imposing a manageability requirement on PAGA cases, however, more clarity is still needed on this issue.

A new world: PAGA and standing under *Huff v. Securitas Security Services*

For years, defendants argued that a PAGA plaintiff lacked "standing" to pursue claims for Labor Code violations which he or she did not personally suffer. In *Huff v. Securitas Security Services USA, Inc*. (2018) 23 Cal.App.5th 745, however, the Court of Appeal concluded that so long as a PAGA representative is affected by at least one Labor Code violation, he or she can pursue penalties on behalf of other aggrieved employees for additional Labor Code violations that he or she did not personally suffer. (*Id*., at 751.)

In its analysis, the Court focused on a PAGA claim's nature as a type of *qui tam* action, brought on behalf of the government. (*Id.*, at 757.) The Court rejected the defendants' argument that the employee must have "personally experienced" the violations pursued in the action, explaining that this standard was similar to the requirements for class certification, but inappropriate in the context of a PAGA representative action. (*Ibid*.) The Court reasoned that allowing plaintiffs "to pursue penalties for Labor Code violations that affected other employees" and "collect a portion of the penalties imposed for those violations" was "precisely what the Legislature intended when it enacted PAGA as a way to encourage private parties to pursue Labor Code violations, relieving pressure on overburdened state agencies and achieving maximum compliance with labor laws." (*Id.*, 761.) Thus, the Court held that "so long as Huff was affected by at least one of the Labor Code violations alleged in the complaint, he [could] recover penalties for all the violations" that he proved. (*Ibid.*)

The *Huff* decision provides a clear basis for California plaintiffs to challenge defendants' arguments regarding standing in the PAGA context. In light of *Huff*, employees should be mindful of other potential Labor Code violations from the onset of the case, e.g., when providing notice to the employer and the California Labor and Workforces Development Agency of the alleged violations. (See, Lab. Code, § 2699.3.) In addition, employees should be sure to account for all potential violations when valuing their cases for mediation or settlement purposes, regardless of whether the named plaintiff personally suffered such violations.

No man's land: Unpaid wages post-*Lawson*

On Sept. 12, 2019, the California Supreme Court issued a long anticipated decision in *ZB, N.A. v. Superior Court of San Diego Cty.* (Sept. 12, 2019) 2019 WL 4309684 ("*Lawson*"), related to the remedies available under PAGA. Prior to *Lawson,* California courts were split on 1) whether a plaintiff in a PAGA action could recover an amount equal to "unpaid wages" as civil penalties under Labor Code section 558 (2) whether a PAGA claim seeking "unpaid wages" under section 558 was subject to arbitration, and (3) who any "unpaid wages" recovered in a PAGA action would be distributed to. *Compare, e.g., Esparza v.* 13 Cal.App.5th at 1245 (compelling a portion of a plaintiff's PAGA claim seeking "unpaid wages" under Labor Code section 558 to arbitration, and assuming that 100% of unpaid wages recovered under section 558 would be paid to the employee); *Zakaryan v. The Men's Wearhouse, Inc*. (Ct. App. 2019) 33 Cal.App.5th 659, rev. May 6, 2019, and *Mejia v. Merchants Bldg. Maint. LLC,* (Ct. App. Aug. 13, 2019) 2019 WL 3798067 (holding that a claim for unpaid wages under section 558 could not be split from the remainder of the PAGA claim and compelled to arbitration). This uncertainty confused trial courts. As a result, many courts stayed cases involving PAGA claims pending the resolution of *Lawson*. The uncertainty also gave rise to questions concerning the approval of PAGA settlements: did a PAGA settlement release claims for unpaid wages? Did this bar aggrieved employees from seeking recovery for these unpaid wages? If so, would approval of a settlement releasing claims for unpaid wages under section 558 require that aggrieved employees be given an opportunity to object to or opt out of the settlement?

Ultimately, the *Lawson* Court held that employees cannot recover "unpaid wages" in a PAGA action under section 558, at all. Instead, employees may only recover the per-pay-period penalties under the PAGA. Accordingly, the Court held that there was no "unpaid wage" portion of Ms. Lawson's PAGA claim that could be severed and compelled to arbitration, since she could not recover these wages through a PAGA claim in the first place.

Although considered a win for employers, viewed in another light, *Lawson* provides much needed clarity to the Plaintiffs' bar. Cases that were previously stayed may now proceed, as *Lawson* confirms that no portion of a PAGA claim may be compelled to arbitration. Moreover, because unpaid wages cannot be recovered under PAGA, settlement approval concerns regarding these wages should now be mooted, leading to a more expedited approval process.

Conclusion

In the last five years, PAGA actions have grown to fulfill their intended purposes as a tool for enforcing state labor laws. As attorneys continue to file, mediate, and settle PAGA claims, the body of law surrounding the statute continues to evolve and take shape. In the meantime, PAGA-only lawsuits

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remain in the limelight and are expected to stay there for years to come.

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