

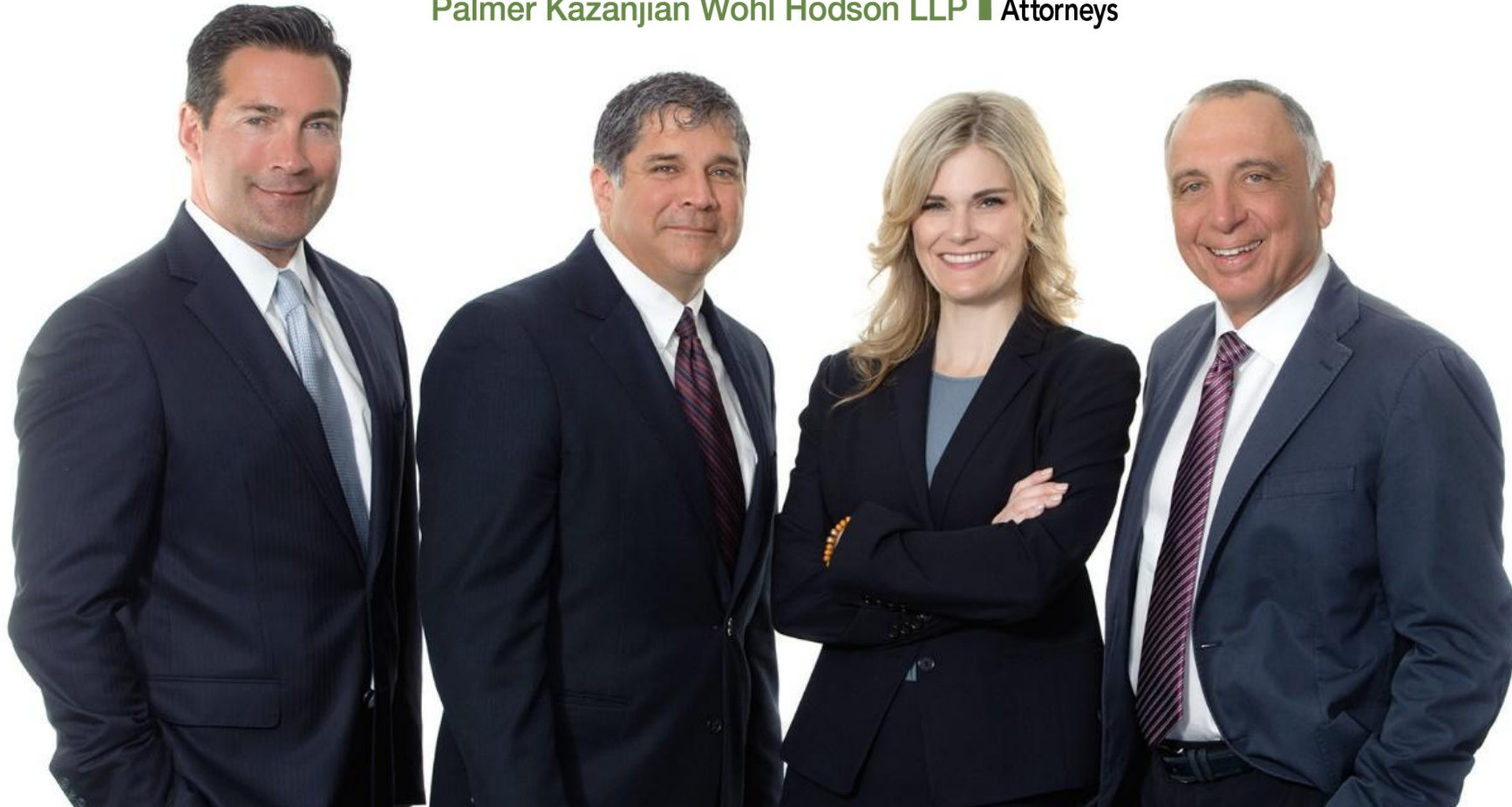
The Private Attorneys General Act (“PAGA”)

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CPCA Presentation



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What Does PAGA Mean?

Background Information

- The California Labor and Workforce Development Agency (“LWDA”) is authorized to assess and collect civil penalties for violations of the Labor Code.
- Because the California Legislature found the LWDA and its constituent departments and divisions were unable to take action against employers for every Labor Code violation, the Legislature enacted the Labor Code Private Attorneys General Act of 2004 (“PAGA”).
- PAGA allows employees to initiate a civil action against their employers to collect civil penalties that were previously collected by the LWDA and its departments and divisions.



Who may bring a PAGA action?

PAGA permits aggrieved employees to file lawsuits on behalf of themselves, other employees, and the State of California to recover civil penalties for Labor Code violations without meeting class action requirements.

Labor Code § 2699(g)(1).

What is an “aggrieved employee?”

PAGA allows an “aggrieved employee”—a person affected by at least one Labor Code violation alleged in the complaint—to pursue civil penalties for all Labor Code violations committed by the employer.

An aggrieved employee may maintain a civil action to recover civil penalties for Labor Code violations “on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed.” [Labor Code § 2699(g)(1)]

- An aggrieved employee who was affected by at least one Labor Code violation may also seek PAGA penalties for different violations that affected other employees.

The plaintiff can sue on behalf of other employees who suffered different violations than those suffered by the plaintiff **so long as** the plaintiff suffered at least one violation.

A PAGA action is a representative action



Any suit under PAGA is a representative action. A representative action is different from a class action.

A PAGA action has a one year statute of limitations, but a class action can have up to a three or four year statute of limitations depending on the claims alleged.



Although PAGA actions may be brought as class actions, it is not mandatory.

Class action certification is not required; i.e., plaintiff may maintain a representative suit under PAGA without satisfying class action requirements, such as the predominance of common questions of law or fact and the typicality of claims.



However, PAGA plaintiffs must exhaust their administrative remedies by first notifying the LWDA of the violations to give the LWDA the opportunity to address the violations itself.

Although the LWDA receives notice of every PAGA action, the LWDA becomes involved in only a very small percentage of PAGA actions filed.

PAGA Penalties

Liability can accumulate quickly for PAGA claims

Under a PAGA action, 75% of the penalties collected goes to the State and 25% goes to the aggrieved employees.

PAGA penalties can quickly accumulate because:

- There are many possible Labor Code violations;
- Strict compliance with technical requirements is needed to avoid many Labor Code violations; and
- Penalties accrue for each violation (per employee per pay period).

Therefore, employers who may not realize they are doing something wrong face more liability as time goes on.

Types of recoverable penalties in PAGA actions

PAGA provides for the recovery of civil penalties for violation of the Labor Code.

The Labor Code will often provide a specific civil penalty for each violation of the Labor Code.

If the Labor Code already provides for a civil penalty for the underlying violation, the employee can sue to recover that penalty on behalf of aggrieved employees and the State in a PAGA action.

If the Labor Code does not provide a specific civil penalty for a Labor Code violation, then the “default” PAGA penalty is used.

Specific Civil Penalties Provided in the Labor Code

Common penalties alleged in PAGA actions for the Labor Code provides a specific civil penalty for include:

Meal period violations

- For initial violations, \$50 per employee per pay period with a meal period violation.
- For subsequent violations, \$100 per aggrieved employee per pay period with a meal period violation.

Rest period violations

- For initial violations, \$50 per employee per pay period with a rest period violation.
- For subsequent violations, \$100 per employee per pay period with a rest period violation.

Failing to pay overtime wages

- For initial violations, \$50 per employee per pay period with an overtime violation.
- For subsequent violations, \$100 per employee per pay period with an overtime violation

Failure to pay minimum wages

- For initial violations, \$100 per employee per pay period with a minimum wage violation.
- For subsequent violations, \$200 per employee per pay period with a minimum wage violation.

PAGA Default Penalties

When the Labor Code does not already provide a civil penalty for a specific violation, the PAGA default penalty is:

- For initial violations, \$100 for each employee per pay period with the violation; and
- For subsequent violations, \$200 for each employee per pay period with the violation.

Violations that fall under the default PAGA penalty include:

- Failure to reimburse employee business expenses;
- Wage statement violations.

Subsequent Violations

For “subsequent violations” to occur and heightened penalties be assessed, an employer must have been notified by the Labor Commissioner or a court that the employer is in violation of the Labor Code.

What constitutes sufficient notice triggering the heightened penalties has yet to be clearly defined.

Potential Exposure for Commonly Alleged PAGA Penalties

Plaintiffs commonly stack the PAGA penalties sought in PAGA action

- Under stacking, a civil penalty for one Labor Code violation in a pay period can be stacked with other civil penalties for other Labor Code violations occurring in the same pay period.
- Whether penalty stacking is permitted by PAGA remains unsettled by California courts.

As an example, a plaintiff alleging violations for minimum wage (\$100), overtime (\$50), meal periods (\$50), rest periods (\$50), and wage statements (\$100) in the same pay period may seek a total of \$350 per employee for one pay period alone.

- The plaintiff may seek \$700 per employee for the one pay period if this were a subsequent violation.

Individual
damages in
addition to
PAGA
penalties;
class
actions

Employers should also be aware that in addition to PAGA penalties, plaintiffs may seek individual damages to compensate for any unpaid monies owed to the plaintiffs.

Plaintiffs can assert those individual claims on behalf of themselves, or they can also assert them as a class action on behalf of similarly situated employees.

If a plaintiff files a class action in addition to a PAGA action, the potential exposure to the employer can significantly increase.

Unpaid wages are not considered a “civil penalty”



Labor Code section 558 permits the Labor Commissioner to recover civil penalties “in addition to an amount sufficient to recover unpaid wages.”



However, unpaid wages which are payable to the employee are not a “civil penalty” recoverable under a PAGA claim. Instead, it constitutes compensatory relief that can be sought individually by plaintiffs or in a class action.



PAGA Actions and Wage Orders

There is no PAGA private right of action to directly enforce Wage Orders.

- But PAGA actions can serve to indirectly enforce certain wage order provisions by enforcing statutes that require compliance with wage orders.

Compliance Audits:
Considerations to Minimize
and Otherwise Avoid Liability



Implement Compliant Policies and Practices

Adopt and implement written policies compliant with the Labor Code and other applicable law.

- Meal period policies should detail all meal period requirements, such as when employees are entitled to a meal period, when the meal period is to be taken so it is not late, the length of the meal periods, and how employees are entitled to leave the work premises on meal periods.
- Rest period policies should detail all rest period requirements, such as when employees are entitled to a rest period, the length of the rest periods, and how employees are entitled to leave the work premises on rest periods provided they can timely return to work at the end of rest periods.

Schedule discipline can be imposed to enforce the policies, including the meal period requirements.

Time records should include an attestation or other verification in which employees sign and attest that all hours they worked are recorded on the time records and they received all meal and rest periods they were entitled to unless otherwise noted on the time records.





Your records should show compliance with applicable laws, such as wage statement requirements, overtime payment, and meal period rules.



Make sure to have records of documents you may consider in assessing compliance, such as policies, timesheets, and pay stubs.



Adopt written policies compliant with the Labor Code and other applicable law

Audit of Records, Policies, and Practices

Audit Timekeeping and Payroll Records and Practices

You should also audit your time and wage records to flag potentially troublesome practices, including:

1. Do you use a rounding policy?
2. Do you automatically deduct time for a meal period?
3. Do the time records show nonexempt employees taking compliant meal periods?
4. Have you ever paid a meal or rest period premium?
5. Are employees allowed to leave the premises during meal and rest periods?
6. Are employees paid at their regular rate of pay, including any commission payments or non-discretionary bonuses, for overtime?
7. Have you strictly complied with requirements if adopting an alternative workweek schedule?
8. Do you maintain or cover the cost of maintaining uniforms?

***This is not an exhaustive list of the potential wage and hour violations, but you and your counsel should audit your records and identify practices and policies that may give rise to Labor Code violations.

Minimizing Risks

To minimize PAGA claim risk, it is recommended to conduct regular audits of wage and hour practices.

Additionally, employers should review whether the company:

1. Classifies any workers as independent contractors.
2. Rounds employee time punches.
3. Has compliant meal- and rest-period policies.

The release in separation agreements should include an agreement that the separating employee not serve as the representative in a PAGA action against the company.

An hourglass with blue sand is shown on a rocky beach. The hourglass is made of dark wood and has two glass bulbs. The sand is flowing from the top bulb to the bottom bulb. The background is a blurred beach scene with rocks and water.

What To Do If Given Notice of a PAGA Action?

The time period for which penalties can be assessed is limited to one year before the date of filing of the PAGA lawsuit, not the date of the PAGA notice.

- However, the one-year period is tolled (paused) during the period in which the employee exhausts their administrative remedies by filing the PAGA notice with the LWDA.

The plaintiff's records should be reviewed to determine if the plaintiff's employment ended before the one year statute of limitations period for PAGA claims ended.

What To Do If Given Notice of a PAGA Action?

Review wage statements going back one year from the date of the PAGA notice for compliance with the requirements under Labor Code section 226(a), ensuring they provide:

- a. gross wages earned;
- b. total hours worked;
- c. the number of piece-rate units earned and the applicable piece rate if the employee is paid on a piece-rate basis;
- d. all deductions;
- e. net wages earned;
- f. start and end dates of the pay period;
- g. the name of the employee and the last four digits of their social security number or an employee ID number;
- h. the name and address of the employing legal entity; and
- i. all applicable hourly rates and the corresponding hours worked at each hourly rate.

If you identify problems, you should immediately correct any missing or inaccurate information on the wage statements.

PAGA and Arbitration Agreements

Agreements to waive PAGA claims are invalid

According to the California Supreme Court, an employee's right to bring a representative PAGA claim cannot be waived.

Therefore, any waiver in an arbitration agreement is unenforceable as a matter of state law.

Agreements to Arbitrate PAGA Claims are Invalid (for now)

A PAGA claim lies outside the Federal Arbitration Act's ("FAA") coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship—it is a dispute between an employer and the State, which alleges directly or through its agents that the employer has violated the Labor Code.

- Courts have ruled that the State was not a party to the employer-employee arbitration agreement.

However, the U.S. Supreme Court will consider whether the FAA preempts California's rule prohibiting arbitration of PAGA claims in 2022.

- The Supreme Court has decided to resolve the specific question of whether the FAA requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including those under PAGA.
- If the Court rules in favor of the employer, the case has the potential to permit employers to limit PAGA representative claims by implementing arbitration agreements (with representative and class action waivers) with their employees.

Unlike PAGA Actions, Class Action Waivers are Enforceable in Arbitration Agreements

- PAGA actions are an enforcement action brought on behalf of the State to deter Labor Code violations, whereas class actions are a procedural device to streamline and aggregate identical claims from a large group of plaintiffs.
- The U.S. Supreme Court ruled that class action waivers in arbitration agreements are enforceable.
- Section 2 of the FAA provides that agreements to arbitrate are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”
- So long as the employer can show a valid agreement to arbitrate and a valid class action waiver, a putative class action plaintiff will be unable to proceed on a class basis in arbitration.
- The status of mandatory arbitration agreements remain unsettled as a case challenging California’s law against mandatory arbitration agreements for employees continues to work its way through the courts.

PAGA and Settlement Agreements

Settlement Agreements Do Not Excuse Labor Code Violations



An employee who reaches a settlement with their employer and releases his or her claims is still considered an “aggrieved employee” under PAGA.



Therefore, the employee who reaches a settlement agreement with their employer can still recover civil penalties in a PAGA action.



Additionally, another employee bringing a PAGA action can still seek penalties on behalf of the employee who signed a settlement agreement with the employer.

The California Supreme Court explained why settlement agreements do not excuse Labor Code violations in *Kim v. Reins International California, Inc.*

- The Legislature described PAGA in terms of *whether a violation in fact occurred*, not on the injury to the employee(s) or how to remedy a violation.
- Therefore, while the parties may resolve their disputes through settlement, settlement will not excuse a Labor Code violation.
- The State's interest in receiving civil penalties for Labor Code violations would be diminished if employers could settle out individual claims to avoid steep civil penalties.

Settlement Agreements Do
Not Excuse Labor Code
Violations

Key Takeaway for Employers

Due to the prevalence of PAGA lawsuits and the aggressive nature of PAGA penalties and plaintiffs' counsel, the best way for employers to avoid liability is to ensure compliance with the Labor Code and conduct regular audits.

Q & A



THANK YOU!