

PAGA & 17200 IN WAGE AND HOUR CASES

BY

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SEPT 17-18, 2009

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I. INTRODUCTION

This paper addresses two important issues in wage and hour litigation that are unique to California: (1) the Private Attorney General Act, and (2) the Unfair Competition Law.

II. THE PRIVATE ATTORNEY GENERAL ACT

A. The Basics of PAGA

The Private Attorney General Act of 2004 (PAGA)³ allows an aggrieved employee to bring suit against an employer for violations of most Labor Code provisions.⁴ Suits brought under PAGA do not affect the employee's right to recover other remedies under state or federal law.⁵ The statute of limitations for PAGA suits is one year.⁶ An employee who prevails in an action brought under PAGA is entitled to an award of reasonable attorney's fees and costs.⁷ It is unlawful for an employer to discriminate against applicants and employees for exercising their rights under PAGA.⁸

B. Who Can Bring a PAGA Claim.

PAGA suits may be brought by an employee on behalf of him or herself "and other current or future employees."⁹ One court has found that the "and" means that an employee must bring the case not only for himself or herself, but also on behalf of other employees.¹⁰ However, the Supreme Court has recently made clear that PAGA representative actions need not satisfy class action requirements.¹¹

C. Penalties Under PAGA

The penalties available under PAGA are those provided in the underlying Labor Code provision that is violated or, if no penalty is listed, those provided by PAGA itself.

Where the Labor Code *does not* provide for a penalty, PAGA establishes a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and

³ CAL. LAB. CODE §§ 2699-2699.5.

⁴ There are three notable causes of action that are excluded from PAGA. First, employees may not sue under PAGA for violations of a posting, notice, agency reporting, or filing requirement of the Labor Code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting. § 2699(g)(2). Second, PAGA does not alter workers' compensation as the exclusive remedy where provided in the Labor Code. § 2699(k). Third, no civil penalty is available where the alleged violation is failure to act on the part of the Labor and Workplace Development Agency. § 2699(f)(3).

⁵ § 2699(g); *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 375 (2005).

⁶ *See Thomas v. Home Depot USA Inc.*, 527 F. Supp. 2d 1003, 1007 (N.D. Cal. 2007) (holding PAGA statute of limitations is one year, and rejecting claim that relevant limitations period is that of the underlying claims).

⁷ § 2699(g).

⁸ § 98.6.

⁹ § 2699(a).

¹⁰ *Machado v. M.A.T. & Sons Landscape, Inc.*, 2009 WL 2230788 (E.D. Cal. Jul. 23, 2009).

¹¹ *Arias v. Superior Court*, 46 Cal.4th 969, 980-87 (2009).

\$200 for each aggrieved employee per pay period for each subsequent violation.¹² A court, however, may award a lesser amount if, based on the facts and circumstances of the case, to award the full amount in damages would be unjust, arbitrary and oppressive, or confiscatory.¹³ Any settlement agreement under PAGA must be approved by a court.¹⁴

Where the Labor Code *does* provide for a civil penalty and public enforcement, an aggrieved employee may still bring a suit and collect these penalties as an alternative to enforcement by the Labor and Workforce Development Agency (LWDA).¹⁵ Some such examples are Labor Code sections 210 and 225.5, which provide that penalties are mandatory for failure to pay wages or for unlawfully withholding wages due, though a court may exercise its discretion in reducing the amount of penalties assessed pursuant to the factors set forth in section 2699(e)(2).¹⁶

For any civil penalties collected under PAGA, seventy-five percent of the penalties are distributed to the LWDA for enforcement and education, and twenty-five percent is distributed to the aggrieved employees.¹⁷

D. Pre-filing Requirements

Employees must satisfy PAGA's notice and administrative exhaustion requirements before they may bring civil suit under PAGA. In fact, failure to plead compliance with these pre-lawsuit procedural requirements is fatal to any claims for civil penalties.¹⁸ PAGA requires an aggrieved employee to give written notice by certified mail to the LWDA and the employer.¹⁹ This notice must include the specific provisions of the code alleged to have been violated, and facts and theories to support the violation.²⁰ For less serious alleged violations, if an employer cures the violation within thirty-three calendar days of the postmark date of notice, and provides the aggrieved employee with notice of such cure, the employee may not file suit under PAGA.²¹

¹² § 2699(f). Wherever the Labor Code gives the Labor and Workforce Development Agency discretion to assess a civil penalty, a court is authorized to exercise the same discretion. § 2699(e)(1).

¹³ § 2699(e).

¹⁴ § 2699(l). Where the alleged Labor Code violations relate to occupational or safety standards, a copy of the proposed settlement must be mailed to the Division of Occupational Safety and Health (OSH). The court must ensure that the settlement is "at least as effective as the protections or remedies provided by state and federal law or regulation of the alleged violation," and OSH's views on this issue must be given appropriate weight. § 2699.3(b)(4).

¹⁵ § 2699(a), (g).

¹⁶ *Amaral v. Cintas*, 163 Cal. App. 4th 1157, 1209-14 (2008).

¹⁷ § 2699(i).

¹⁸ *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 381-82 (2005).

¹⁹ § 2699.3(a)(1). For claims under PAGA for violations of occupational health and safety standards contained in the Labor Code, the aggrieved plaintiff must provide notice to OSH and the employer. § 2699.3(b)(1). The OSH procedural requirements differ slightly from those for claims under the LWDA. *See* § 2699(b). For the sake of simplicity, this section will outline only the procedural requirements for Labor Code provisions that are relevant to the LWDA.

²⁰ § 2699.3(a)(1).

²¹ § 2699.3(c). *See also Dunlap v. Superior Court*, 142 Cal. App. 4th 330, 338-39 (2006) (quoting Senate Floor Analysis as noting employers have an opportunity to cure "less serious violations," allowing LWDA to first investigate more serious violations). Examples of violations that are subject to "cure" include classification of employees as exempt from overtime pay requirements, § 515, and failure to adopt an

If the LWDA decides not to investigate the alleged violation, the agency must notify the employer and aggrieved employee by certified mail of this decision within thirty calendar days of the postmark date of employee's notice.²² When an aggrieved employee receives this notice, or if no notice is provided within thirty-three calendar days of the postmark date of the original notice, the aggrieved employee may file a civil action.²³

If, on the other hand, the LWDA decides to investigate the alleged violation, it must notify the employer and aggrieved employee by certified mail of its decision within thirty-three calendar days of the postmark date of the employee's notice.²⁴ Within 120 days of the agency's decision to investigate, it may issue any appropriate citation.²⁵ If the agency determines that no citation will be issued, it must notify the employer and aggrieved employee by certified mail within five days of arriving at that decision.²⁶ An aggrieved employee may file a civil action upon receipt of a notice from LWDA that it will not issue a citation or if no citation is issued by the agency within 158 days and the agency fails to provide timely or any notification.²⁷ The provided notice period is not counted against the aggrieved employee for the statute of limitations for his or her civil action.²⁸

These procedural requirements do not apply to all claims brought under the Labor Code, only those brought using the PAGA enforcement mechanism. There is no pre-filing notice or exhaustion requirement for employees who seek unpaid wages and interest, or statutory penalties that are not enumerated in PAGA or were recoverable by employees before PAGA's enactment.²⁹

E. Policy Behind PAGA

The California Legislature envisioned PAGA as a robust enforcement tool for private citizens to bring Labor Code enforcement actions against their employers. This bill was necessary because:

injury and illness prevention program, § 6401.7. See § 2699.3(c) (listing violations subject to cure). An aggrieved employee may dispute whether the alleged violation has been cured. § 2699.3(c)(3). In addition, no employer may avail himself or herself of this cure provision more than three times in a twelve-month period for the same violations, regardless of the location of the worksite. § 2699.3(c)(2)(B).

²² § 2699.3(a)(2)(A).

²³ *Id.*

²⁴ § 2699.3(a)(2)(B).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* § 2699.3(d).

²⁹ See *Dunlap v. Superior Court*, 142 Cal. App. 4th 330, 339-40 (2006) (noting PAGA's procedural requirements "are triggered when an aggrieved employee seeks civil penalties for a violation of a Labor Code provision that previously provided for recovery of a civil penalty by the Commissioner" (quoting *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 382 (2005))).

[E]ssential labor law enforcement functions is necessary to achieve maximum compliance with state labor laws . . . and to ensure an effective disincentive for employers to engage in unlawful and anticompetitive business practice. . . . Staffing levels for state labor law enforcement agencies have, in general, declined in the last decade and are likely to fail to keep up with the growth in the labor market [I]t is . . . in the public interest to provide that civil penalties for violations of the Labor Code may also be assessed and collected by aggrieved employees acting as private attorneys general.³⁰

The Legislature noted that PAGA “is intended to augment the enforcement abilities of the Labor Commissioner by creating an alternative ‘private attorney general’ system for labor law enforcement.”³¹ The Legislature’s desire to create a robust enforcement mechanism was so clear that a court found that an arbitration waiver—which precluded the employee from bringing civil suits on behalf of other employees—was contrary to PAGA, and therefore unconscionable and unenforceable.³²

In sum, PAGA remains a viable enforcement option that allows an aggrieved employee to bring a civil action against her employer on behalf of herself and fellow employees.

III. UNFAIR COMPETITION LAW

A. The UCL Basics

In California, wage and hour claims may be brought under the Unfair Competition Law (UCL).³³ Unfair competition includes “any unlawful, unfair or fraudulent business act or practice,”³⁴ which courts have held includes Labor Code violations.³⁵ A remedy under the UCL does not preclude any other available remedies under state law.³⁶

B. Procedure for Bringing UCL Claims

Claims under UCL may be brought individually or on behalf of a class,³⁷ as long as these actions comply with California’s class action requirements.³⁸ Until recently, the UCL contained a private attorney general mechanism, which allowed plaintiffs to bring

³⁰ Stats.2003, ch. 906, §1.

³¹ Sen. Rules Comm., Off. of Sen. Floor Analyses, analysis of Sen. Bill No. 796 (2003-2004 Reg. Sess.) (as amended Sept. 2, 2003, p. 2).

³² *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277, 1303 (2009).

³³ CAL. BUS. & PROF. CODE §§17200-17210.

³⁴ § 17200.

³⁵ *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178 (2000).

³⁶ § 17205.

³⁷ *Id.*

³⁸ § 17203 (citing CAL. CIV. PROC. CODE § 382); see *Arias*, 46 Cal.4th at pp. 977-80.

suits on behalf of the general public.³⁹ However, in 2004, Proposition 64 amended the UCL's standing requirement to provide standing only to an individual who has suffered "injury in fact and has lost money property as a result of the unfair competition."⁴⁰ No right to a jury trial exists for a claim brought under the UCL, because the available remedies are solely equitable.⁴¹

The statute of limitations for claims under the UCL is four years,⁴² as opposed to the three-year period available under the Labor Code.⁴³ Plaintiffs' attorneys should plead UCL claims alongside any Labor Code violation; one court found that a question of fact existed as to whether attorneys violated their duty to class members by failing to assert a UCL claim with a claim under the Labor Code.⁴⁴

C. Relief Under the UCL

Claims brought under the UCL are equitable actions. Courts may enjoin a person or company from engaging in unfair competition, or make any order or judgments necessary "to restore to any person in interest any money . . . which may have been acquired by means of such unfair competition."⁴⁵ Because UCL actions sound in equity, a defendant may assert equitable defenses, even if these defenses are not available for the underlying Labor Code violation.⁴⁶ These defenses may not wholly defeat a UCL claim, but "may be considered by the court when the court exercises its discretion over which, if any, remedies . . . should be awarded."⁴⁷

Compensatory damages are not available under the UCL.⁴⁸ However, a court may provide plaintiffs with restitution, in the form of backpay that was unlawfully withheld from an employee's wages.⁴⁹ In addition, employees may recover as restitution tips that the employer unlawfully paid to managers.⁵⁰ Pre-judgment interest may also be awarded

³⁹ See *Schulz v. Neovi Data Corp.*, 152 Cal. App. 4th 86, 91 (2007) (noting that previously "any person acting for the interest of . . . the general public" could bring suit).

⁴⁰ CAL. BUS. & PROF. CODE § 17204; *Trujillo v. First Amer. Registry, Inc.*, 157 Cal. App. 4th 628, 639 (2007). The California Supreme Court has held that these standing requirements apply to any cases pending when Proposition 64 took effect, *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 232 (2006), but that private plaintiffs who lost standing under Proposition 64 could amend their complaint to substitute new plaintiffs with standing. *Branick v. Downey Sav. & Loan Ass'n*, 39 Cal. 4th 235, 241 (2006).

⁴¹ *Hodge v. Superior Court*, 145 Cal. App. 4th 278, 284-85 (2006).

⁴² § 17208; *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 179 (2000).

⁴³ *Janik v. Rudy, Exelrod & Zieff*, 119 Cal. App. 4th 930, 934 (2004).

⁴⁴ *Id.* at 936-43.

⁴⁵ § 17202.

⁴⁶ *Cortez*, 23 Cal. 4th at 179.

⁴⁷ *Id.* at 179-180.

⁴⁸ *Id.* at 173.

⁴⁹ *Id.* at 177.

⁵⁰ *Grodensky v. Artichoke Joe's Casino*, 171 Cal. App. 4th 1399, 1431 (2009). See also *Lu v. Hawaiian Gardens Casino, Inc.*, 88 Cal. Rptr. 2d 345, 362 (2009) (finding plaintiff presented triable issues of fact about whether tip pooling violates underlying Labor Code provision for UCL claim), *review granted*, ___ Cal. Rptr. 3d ___, 2009 WL 1466402 (Cal. Apr. 29, 2009).

as part of restitution.⁵¹ Waiting time penalties under Labor Code Section 203, for an employer's failure to make immediate payment of wages to an employee who voluntarily terminates employment are not recoverable as restitution under the UCL.⁵²

D. Open Questions: The UCL's Reach

The UCL's precise reach is unclear. The Ninth Circuit has certified two questions to the California Supreme Court related to the UCL's interaction with wage and hour claims. First, does the UCL apply to overtime work performed in California for a California-based employer by out-of-state plaintiffs?⁵³ Second, does the UCL apply to overtime work performed *outside* California for a California-based employer by out-of-state plaintiffs?⁵⁴

⁵¹See, e.g., *People ex. rel. Bill Lockyer v. Fremont Life Insurance Co.* (2002) 104 Cal.App.4th 508, 532 (“The trial court’s order is reasonably calculated to restore the status quo ante by requiring appellant to offer to restore, inter alia, any premium charges imposed, *and legal interest thereon* from the date of imposition.”) (emphasis added); *People v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 132 (affirming trial court order that makes restitution in the amounts of excess rents charged, plus prejudgment interest on those amounts); *Ballard v. Equifax Check Services, Inc.* (E.D. Cal. 2001) 158 F.Supp.2d 1163, 1176-77 and n.17 (as restitution for the UCL violation, the court ordered the defendant to pay the amount of the service charge “plus pre-judgment interest”).

⁵² *Pineda v. Bank of Amer., N.A.*, 87 Cal. Rptr. 3d 864, 867 (2009), *review granted*, 93 Cal. Rptr. 3d 536 (2009).

⁵³ *Sullivan v. Oracle Corp.*, 557 F.3d 979, 983 (2009). See also *In re Wells Fargo Overtime Litig.*, 527 F. Supp. 2d 1053, 1062 (N.D. Cal. 2007) (certifying class with common question: whether defendant’s conduct emanating from California may be applied to a class of nationwide plaintiffs).

⁵⁴ *Sullivan*, 557 F.3d at 983.