PAGA: A decade of victories

The Private Attorneys General Act has been empowering plaintiff attorneys in employment law for ten years

By Bryan Schwartz and Cecilia Guevara Zamora

This year marks the ten-year anniversary of California's Private Attorneys General Act of 2004, an essential weapon in an employee rights advocate's arsenal. Under PAGA an aggrieved employee can recover civil penalties on behalf of the State's Labor Workforce Development Agency (LWDA) for all current and former employees for Labor Code violations. (§ 2699(a).) Originally enacted to attack California's underground economy – businesses unlawfully operating outside of the state's tax and licensing requirements – and enhance revenues (California Bill Analysis, S.B. 796 Sen., 4/29/2003), PAGA gives workers' rights advocates an ability to vindicate the State's interest in obtaining redress for flagrant wage violations statewide.

PAGA representative actions do not need to meet class action requirements

In *Arias v. Superior Court* (2009) 46 Cal.4th 969, the plaintiff brought a representative PAGA claim for wage and hour violations, among other claims. (*Id*. at 976.) The trial court granted defendant's motion to strike the PAGA claim and other causes of action, for failure to comply with the pleading requirements for a class action. (*Ibid*.) Subsequently, the Court of Appeal issued a peremptory writ of mandate directing the trial court to strike other causes of action, but not the PAGA claim. (*Ibid*.) The California Supreme Court agreed with the Court of Appeal – holding that a plaintiff suing under PAGA did not need to comply with California's class-action requirements. (*Id*. at 988.)

Arias addressed and dismissed three arguments posed by defendants: (1) the Court of Appeal's construction of PAGA would lead to absurd results because one subdivision in the statute allows for class actions, while another subdivision does not, (2) the legislative history indicates the legislature intended actions under the act to be brought as class actions, and (3) the act violates due process rights of defendants. (*Id*. at 982-84.) Rejecting these positions, the Court held that a PAGA plaintiff sues as the "proxy or agent" of the state's labor law enforcement agencies. (*Id*. at 986.) As such, a PAGA plaintiff represents the same legal rights and interests as state labor law enforcement agencies. (*Ibid*.) Ultimately, the PAGA claim is an enforcement action, not a class action brought for recovery of civil penalties, so it need not comply with class action pleading requirements.

Most federal courts have likewise held that a PAGA claim need not be certified under Rule 23. (See, *e.g.*, *Cardenas v. McLane Foodservices, Inc.* (C.D. Cal., Jan. 31, 2011) SACV 10-473 DOC FFMX, 2011 WL 379413, *3 (a PAGA claim neither purports to be a class action nor intends to accomplish the goals of a class action); *Sample v. Big Lots Stores, Inc.* (N.D. Cal., Nov. 30, 2010) C 10-03276 SBA, 2010 WL 4939992, *3 (the Class Action Fairness Act (CAFA) "applies only to state statutes or procedural rules that are similar to a federal class action brought under Rule 23" – but PAGA claims are distinct from class actions). But see, *Fields v. QSP, Inc.* (C.D. Cal., June 4, 2012) CV 12-1238 CAS PJWX, 2012, WL 2049528, *5 (plaintiff must meet requirements of Rule 23 because PAGA is a procedural mechanism).

PAGA claims cannot be forced to individual arbitration

As the nation's High Court shows increasing animus towards class actions – reimagining the Federal Arbitration Act of 1925 (FAA) to diminish Federal Rule

of Civil Procedure 23's efficacy as a method through which employees and consumers can vindicate their rights – the State of California, through private counsel, can still pursue relief for workers through PAGA representative actions.

In *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, the U.S. Supreme Court relied on the FAA to abrogate *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, which had held that the party with superior bargaining power unconscionably carried out a scheme to cheat large numbers of consumers out of individually small sums of money, using an arbitration agreement with a class-action waiver to prevent class action and meaningful relief. While *Concepcion* stunted class-action litigation, it did not address PAGA representative actions brought on behalf of the LWDA.

The California Court of Appeal held that PAGA claims are not subject to individual arbitration agreements in *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, review denied (Oct. 19, 2011), cert. denied 132 S.Ct. 1910 (Apr. 16, 2012). In *Brown*, the plaintiff brought both a class-action claim and a PAGA claim against her employers for various labor code violations. (*Id*. at 494.) The employers moved to compel individual arbitration based on a provision in the employment contract, which they argued prohibited both class actions and representative PAGA claims. (*Id*. at 495.) While the class claim fell to arbitration, the PAGA claim averted arbitration. The *Brown* court concluded *Concepcion* did not address – and thus could not be binding on – PAGA, which is an enforcement action in which employees and their counsel act as an "agent or proxy" of the state. (*Id*. at 503.) See also, *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1124 (PAGA is not within the scope of individual arbitration because a PAGA claim is not an individual claim). Other courts disagreed with *Brown* and *Reyes*, including *Iskanian v. CLS Transp. Los Angeles, LLC* (Cal. Ct. App. 2012) 142 Cal.Rptr.3d 372. In *Iskanian*, the Court of Appeal declined to follow *Brown* and *Reyes* in a case brought by drivers, who brought a PAGA representative action but had signed an employment contract with an individual arbitration agreement. (*Id*. at 375, 384.)

Reversing, the California Supreme Court held that a PAGA claim could not be subject to an individual arbitration provision in an employment contract. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 384.) The Court reasoned that a PAGA action was a type of qui tam action (*Id*. at 382) – whereby a plaintiff brings an action on behalf of the State. However, unlike a pure qui tam case, where the relator collects a "bounty," the 25 percent goes to all the aggrieved employees – not just the plaintiff. (*Ibid*.) PAGA is not and has never been intended as a "bounty hunter" statute.

The Court also reaffirmed *Arias*' holding that a plaintiff bringing a PAGA claim acts as an "agent or proxy" of the state's labor law enforcement agencies. (*Id*. at 382.) The Court also drew from the Supreme Court's decision in *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, which held that an employment arbitration agreement governed by the FAA did not prevent the Equal Employment Opportunity Commission (EEOC) from suing an employer on behalf of an employee bound by that agreement for victim-specific relief. (*Iskanian*, 59 Cal.4th at 386.) In *Waffle House*, the EEOC was not a party to the arbitration agreement and could bring an enforcement action regardless of the private agreement. (*Ibid*.) Similarly, a PAGA claim lies outside the FAA's 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. (*Ibid*.)[1]

PAGA creates an unwaivable public policy right

Iskanian reminds us that a PAGA creates an unwaivable public policy right: any agreement by employees to waive their right to bring a PAGA claim serves to disable one of the primary mechanisms for enforcing the Labor Code. (*Id.*, 59 Cal.4th at 383.) Because such an agreement has the "object, … indirectly, to exempt [the employer] from responsibility for [its] own…violation of the law," (Civ. Code, § 1668) it is against public policy and unenforceable as a matter of law. Further, a court must review and approve any proposed settlements that attempt to release PAGA claims. (See Lab. Code, § 2699(l).)

In *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003, the Court held that PAGA did not create a transferable property right, such that a union did not have standing to bring a PAGA claim on behalf of aggrieved employees. Because of the "simply procedural" language posited in *Amalgamated*, federal courts have been mixed on the question of the type of right created by PAGA, leading some federal courts to interpret PAGA as a "simply procedural" statute that can be preempted by Rule 23's class certification requirements. *Compare Cunningham v. Leslie's Poolmart, Inc.* (C.D. Cal., June 25, 2013) CV 13-2122 CAS CWX, 2013 WL 3233211, *7 (a PAGA claim is a type of qui tam action and thus, substantive in nature); *Moua v. International Business Machines Corp.* (N.D. Cal., Jan. 31, 2012) 5:10-CV-01070 EJD, 2012 WL 370570, *3 (PAGA transcends the definition of what is simply procedural); and *Mendez v. Tween Brands, Inc.* (E.D. Cal., July 1, 2010) 2:10-CV-00072-MCE, 2010 WL 2650571, *3 (to find that PAGA creates a wholly procedural right, and that Rule 23 therefore applies, would be to ignore the intent of the legislature in passing the statute); with *Fields*, 2012 WL 2049528 (PAGA "is simply a procedural statute") (citing *Amalgamated*, 46 Cal.4th at 1003); *Halliwell v. A-T Solutions* (S.D. Cal. 2013) 983 F.Supp.2d 1179, 1183-84 (Federal Rule of Civil Procedure 23 governs all representative claims brought in federal court, even if the underlying individual

claims arise under state law) (citing *Fields* at *5). With *Iskanian* reaffirming PAGA's unwaivable public policy right and likening the statute to a qui tam action, which according to *Cunningham* is substantive in nature, federal courts should think twice before interpreting PAGA as simply a procedural state statute that can be preempted by federal procedural rules.

PAGA and fee shifting

PAGA allows workers their day in court when the cost of litigation would otherwise impede access to justice. In *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, plaintiffs brought an unsuccessful class action for violation of wage and hour laws and unfair competition laws. The employer sought to recover fees for the defeated meal and rest period claims under Labor Code section 226.7, invoking section 218.5's two-way fee-shifting provision. The court concluded that section 218.5 did not apply to meal/rest claims and that neither party could recover attorneys' fees for an action brought under section 226.7. (*Id.* at 1248.) While the *Kirby* ruling shielded plaintiffs from having to pay an employer's attorneys' fees when they are unsuccessful in vindicating claims for denied meal and rest breaks, it also would have left workers in most cases without representation in bringing such claims.

PAGA to the rescue

Under section 2699(g)(1), a plaintiff who brings a PAGA claim to recover payment for missed meal and rest breaks can recover attorneys' fees. PAGA may also be used to seek attorneys' fees for other statutory provisions which vindicate public policy but do not contain separate fee provisions, such as waiting time penalty claims under Labor Code section 203, and whistleblower claims under Labor Code section 1102.5. The fee-shifting provision levels the playing field, especially for low-income workers going up against employers that would otherwise drown the workers' claims in insurmountable litigation costs.

PAGA penalties

In *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, a case in which a bus driver brought a PAGA claim, the Court of Appeal discussed the issue of PAGA penalties. The Court first held that Thurman could recover civil penalties under Labor Code section 558 which provides in relevant part: "(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the [IWC] shall be subject to a civil penalty. (*Id.* at 1130.)

The provision allowing recovery of penalties under PAGA did not extend so far as to allow plaintiff to recover civil penalties under both PAGA and Wage Order 9 (which contained its own civil penalties provision) because doing so would "allow an impermissible double recovery for the same act." (*Id.* at 1131.)

Further, Thurman could recover unpaid wages as part of the civil penalty under PAGA. The Court held that the civil penalty under Labor Code section 558 consisted of both the monetary penalty amount and the underpaid wages, with the underpaid wages going entirely to the affected employee or employees as an express exception to the general rule that civil penalties recovered in a PAGA action are distributed seventy-five percent to the Labor and Workforce Development Agency (LWDA) and twenty-five percent to the aggrieved employees. (*Id.* at 1145.)

Aggrieved employees can also recover penalties for missed meal and rest breaks under PAGA as the civil penalty under section 558 applies to "any provision regulating hours and days of work in any order" of the IWC, including the rest period requirement. (*Id.* at 1153.)

Additionally, in *Sarkisov v. StoneMor Partners, L.P.* (N.D. Cal., Apr. 3, 2014) C 13-04834 WHA, 2014 WL 1340762, *5, the Northern District of California held that a PAGA plaintiff can sue for PAGA penalties applicable to his own individual action – that is, for the injuries done just to him – without having to prove all PAGA penalties for everyone else in the same workplace.

PAGA and joint employers

PAGA allows employees to hold joint employers – including culpable, individual corporate owners – accountable for Labor Code violations. In *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1094, overruled on other grounds by *Martinez v. Combs* (2010) 49 Cal.4th 35, Justice Moreno, in his concurrence, raised the possibility that the then-new PAGA statute would permit individual liability for corporate officials for wage violations. Justice Moreno explained that "the Private Attorneys General Act… authorizes civil penalties for violations of the wage laws that include unpaid wages from 'any employer or other person acting on behalf of an employer,' a phrase conceivably broad enough to include corporate officers and agents in some cases." (*Reynolds,* 36 Cal.4th at 1094.) *Thurman* reaffirms Justice Moreno's concurrence. (*Thurman* 203 Cal.App.4th at 1144.) Federal courts have also individual owners accountable for wage violations based upon PAGA. In *McDonald v. Ricardo's on the Beach, Inc.* (C.D. Cal., Jan. 15, 2013) CV 11-9366 PSG MRWX, 2013 WL 153860, *1, the plaintiff brought a PAGA claim for wage and hour violations, and the defendant moved for summary judgment alleging he could not be held liable under PAGA because he was an absentee owner. (*Ibid.*)

The court first made clear that PAGA encompasses "any provision" of the Labor Code. (*Id.* at *3.) The Court also said Labor Code section 558 – individually actionable through PAGA – makes clear that an individual defendant can be subject to the penalties of Labor Code section 510 if he is "acting on behalf of an employer who violates, or causes to be violated" (Lab.Code, § 510. (citing *Ontiveros v. Zamora* (E.D. Cal., Feb. 20, 2009) CIV S-08-567LKK/DAD, 2009

WL 425962). In denying defendant's summary judgment motion, finding that the owner could be a liable "employer" based upon PAGA, the Court relied on evidence that defendant's company prepared paychecks, and that defendant signed paychecks, sometimes brought them to be distributed, and made policy decisions pertaining to the company. (*Id*. at *4-5.)

Removal to federal court

A PAGA action is not easily removed to federal court. Aggrieved employee penalty amounts cannot be aggregated to satisfy amount-in-controversy requirements for purposes of diversity jurisdiction. (See *Urbino v. Orkin Services of California Inc.* (9th Cir. 2013) 726 F.3d 1118.) Further, while *Pagel v. Dairy Farmers of America, Inc.* (C.D. Cal. 2013) 986 F.Supp.2d 1151, 1157, sought to limit *Urbino* to non-CAFA cases, the holding has been undermined by *Baumann v. Chase Inc. Services Corp.* (9th Cir. 2014) 747 F.3d 1117. *Baumann* held that PAGA actions are not sufficiently similar to Rule 23 class actions to trigger CAFA jurisdiction, reaffirming *Urbino's* holding that potential PAGA penalties against an employer may not be aggregated to meet the amount in controversy requirement, and holding that CAFA provides no basis for federal jurisdiction over a PAGA action.

Looking ahead

There are still some lingering questions pertaining to PAGA. For example, it is still unclear what protections PAGA affords public sector employees and whether the U.S. Supreme Court will choose to foray into uniquely California law once again to force down the Chamber of Commerce-sponsored agenda and squelch California's PAGA enforcement actions. Despite these uncertainties, with a growing list of favorable jurisprudence, PAGA is becoming an unmatched weapon in the fight for workers' rights.


Schwartz

Bryan Schwartz has an Oakland-based firm representing workers in class, collective, and individual actions in wage/hour, discrimination, whistleblower, and unique federal and public employee claims. He practices in state and federal trial and appeals courts, in arbitration, and before a variety of administrative agencies. Schwartz is an Executive Board member for the California Employment Lawyers Association (CELA), on the State Bar of California's Labor & Employment Law Section Executive Committee, and will be Chair of the 7200-member Labor & Employment Law Section. He is President of FAIR (http://www.fair-foundation.org/), an organization dedicated to providing fellowships to enter plaintiffs' employment law for diverse new lawyers and law students. Schwartz is an amicus writer for CELA, having authored or co-authored the organization's Supreme Court briefs in Brinker, Kirby, and Duran. He can be contacted at Bryan@BryanSchwartzLaw.com or www.bryanschwartzlaw.com.


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Endnote

[1] *Iskanian* undermines *Fardig v. Hobby Lobby Stores, Inc.* (C.D. Cal. June 13, 2014) SACV 14-561 JVS ANX, 2014 WL 2810025, *7 n. 10, which held shortly before the California Supreme Court ruled in *Iskanian* "that the arbitration of representative PAGA claims would frustrate the objectives of the FAA in contravention of *Concepcion*." It remains to be seen how federal courts will react post-*Iskanian*.