



PAUL
HASTINGS

PAGA

Past, Present, and Future (and
What Employers Can Do Now)

JANUARY 12, 2023

Agenda

1. Background on PAGA
2. Legislative Update: “PAGA” Outside of California
3. Legislative Update: Proposed “Fair Play and Employer Accountability Act”
4. Judicial Updates regarding PAGA
5. Strategies for Employers

Background on PAGA

What is PAGA?

- Gives individuals a vehicle to recover civil penalties already in the Labor Code
- Imposes civil penalties not previously specified in the Labor Code

Why do we have PAGA?

- Before PAGA, individuals could recover statutory penalties, but only the LWDA could recover civil penalties
- Because the LWDA was overwhelmed and understaffed, PAGA deputized private citizens to enforce the Labor Code

Penalties under PAGA

- 75% of recovered penalties go to the state, 25% go to aggrieved employees
- PAGA provides default civil penalties at \$100 for every employee for every pay period for the first violation, and \$200 for each violation thereafter

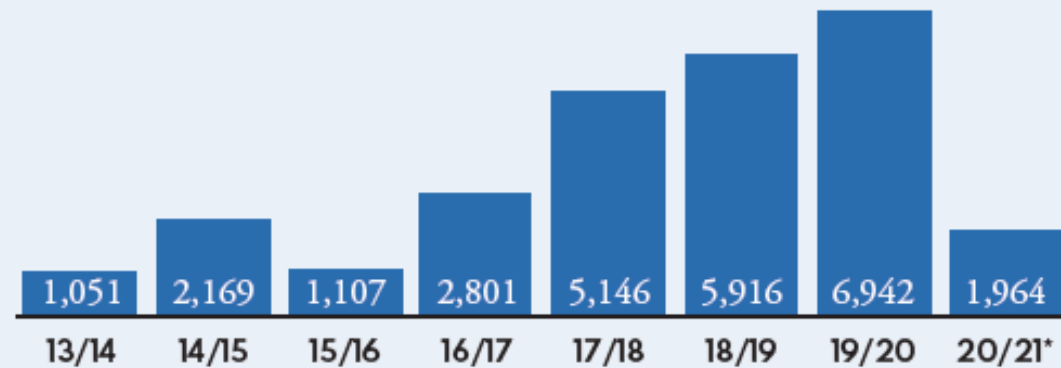
Background on PAGA

The Plaintiffs Bar latches on...



Chart 1: Number of PAGA Cases Filed by Fiscal Year

Avg. 5,200 cases FY (16/17-19/20)

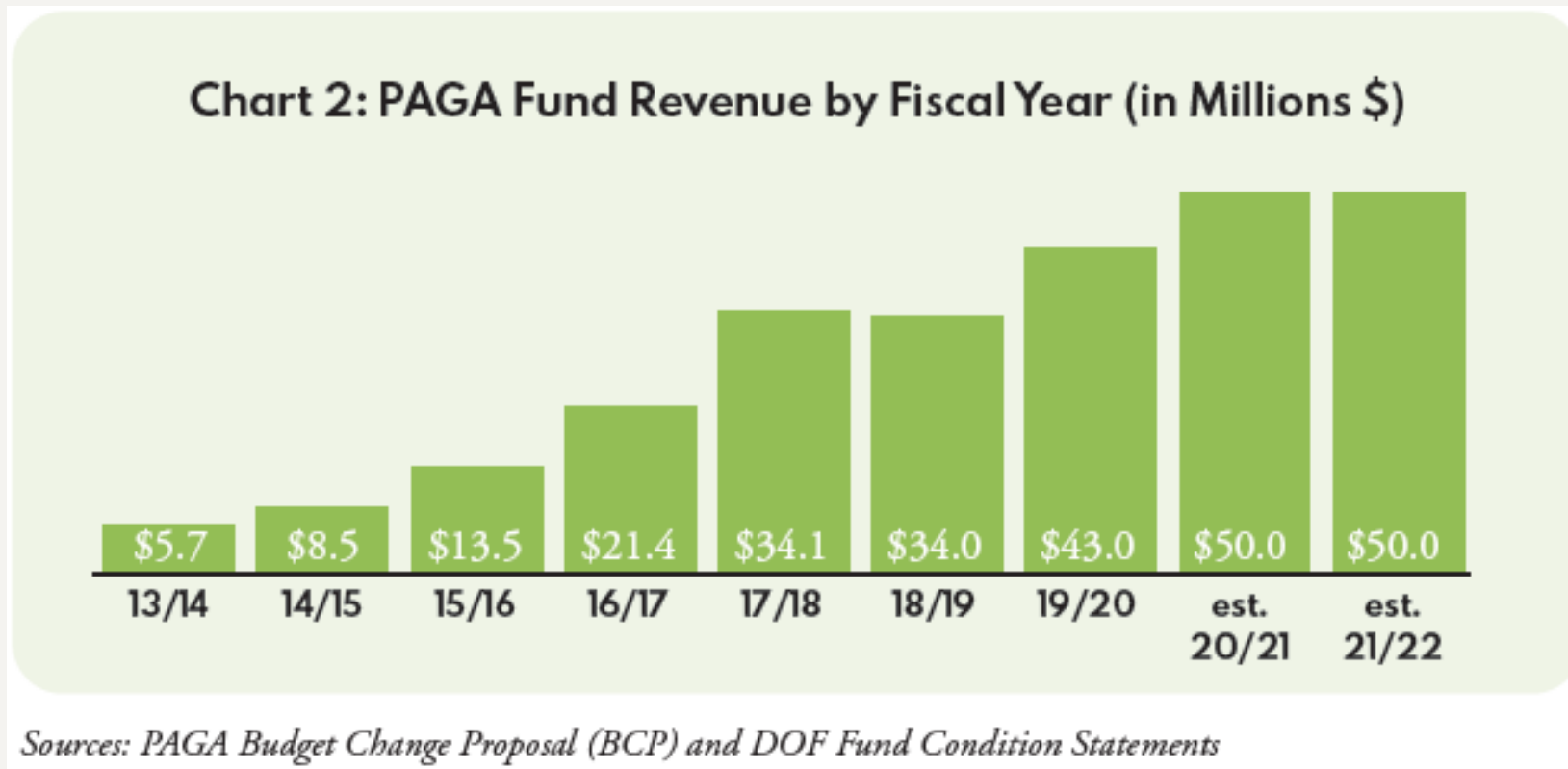


*FY 20/21 data is complete through September 2020.

Source: External PAGA Case Data File

Background on PAGA

The Plaintiffs Bar latches on...



“PAGA” Outside of California



Maine: Maine’s legislature passed PAGA-type legislation (L.D. 1711) in June 2021, only for the Governor to later veto it. Because it passed both houses, there is a real possibility it may be reintroduced.

New York: The Empowering People in Rights Enforcement Worker Protection Act (A5876) was introduced on March 2021. The bill is currently in committee in the state senate and assembly.



Washington: The proposed law (HB 1076) passed in the state’s house, but died in one of the state’s senate committees in 2021. The bill was reintroduced in early 2022.

“PAGA” Outside of California

Oregon: A bill (HB 2205) has been proposed to allow individuals and certain representative organizations to bring enforcement action for alleged violations of state employment laws. The bill failed in summer 2021.



New Jersey: The New Jersey Fair Workweek Act (S921) would establish employee scheduling rules and give workers the right to sue on behalf of the state to enforce those rules. The bill was referred to the state senate labor committee in January 2022.

Connecticut: A proposed bill (HB 6475) would allow labor unions and other advocacy groups to file claims over workplace violations. The bill is currently stalled in committee.



PAGA Legislative Update

2024 Ballot Initiative: The Fair Play and Employer Accountability Act

Proposed Law

Section 1. Part 13 of Division 2 of the Labor Code (commencing with Section 2698) is amended to read:

Part 13

2698 Title. This Part shall be known, and may be cited, as the Labor Code ~~Private Attorneys General~~ Fair Pay and Employer Accountability Act of 2004 2022.

PAGA Legislative Update

The Fair Pay and Employer Accountability Act would:

- Repeal PAGA;
- Eliminate the Labor Commissioner's authority to contract with private organizations or attorneys to assist with enforcement;
- Require the Legislature to provide funding for Labor Commissioner enforcement;
- Require the Labor Commissioner to provide pre-enforcement advice;
- Allow employers to correct identified labor-law violations without penalties;
- Award all penalties to the "aggrieved" employee; and
- Double penalties for willful violations.

PAGA Legislative Update

What's the bottom line (if it passes)?

- Employees can no longer file lawsuits for monetary penalties for violations of California labor laws.
- The Labor Commissioner retains authority to enforce labor laws and impose penalties. ALL penalties will go to aggrieved employees.

Judicial Update – *Viking River*

- SCOTUS granted certiorari “to decide whether the [FAA] preempts a rule of California law [Iskanian] that invalidates contractual waivers of the right to assert representative claims under [PAGA].”
- Decision (June 15, 2022)
 - Left intact *Iskanian*’s principal holding that parties cannot entirely waive representative standing to bring PAGA claims in judicial or arbitral forum
 - Held FAA preempts *Iskanian*, permitting division of representative’s individual and non-individual claims
 - Interpreted K’s severability provision as entitling ER to compel arbitration of EE’s individual claim

Judicial Update – *Viking River*

- **Justice Sotomayor’s concurrence:**
 - “[T]he Court reasons, based on available guidance from California courts, that Moriana lacks ‘statutory standing’ under PAGA to litigate her ‘non-individual’ claims separately in state court. [Citation.] Of course, if this Court’s understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court’s understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits.”

Judicial Update – *Viking River*

Right now

- Many cases stayed pending *Adolph* decision
- Defendants now moving to compel individual PAGA claims to arbitration, and dismiss non-individual PAGA claims
- Success varies by
 - Arbitration agreement
 - CAA/FAA, valid K, covered claims, waiver, severability, savings clauses
 - State or federal
 - See, e.g. *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668 (9th Cir. 2021) (representative PAGA plaintiff who did not suffer any meal-break violation lacked Article III standing to represent aggrieved employees who did)

Judicial Update – Manageability Requirement?

- In *Wesson v. Staples the Office Superstore, LLC*, California’s Court of Appeal considered a question of first impression: Do trial courts have the inherent ability to manage PAGA claims?
- For years, this has been an oft-debated issue in PAGA cases.
 - Plaintiffs argue that nothing in the PAGA statute says that such a right exists
 - Defendants argue the inverse
- Shortly after *Wesson* issued, another decision going the other way followed, leaving the issue unresolved

Judicial Update – Manageability Requirement? (Cont.)

State – Split

Yes

- *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021) (trial courts have inherent authority to ensure claims brought under PAGA will be manageable at trial)

No

- *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal.App.5th 685 (2022) (court cannot strike PAGA claims based on manageability because PAGA is not subject to class action requirements; and requirement would interfere with purpose as law enforcement mechanism)
 - But, “Courts may still, where appropriate and within reason, limit the amount of evidence PAGA plaintiffs may introduce at trial to prove alleged violations to other unrepresented employees. If plaintiffs are unable to show widespread violations in an efficient and reasonable manner, that will just reduce the amount of penalties awarded rather than lead to dismissal.”
 - Review granted May 2, 2022, fully briefed as of Sept. 26, 2022

Judicial Update – Preclusion Issues

For claim preclusion purposes, harm suffered by an employee in a first action against employer, in which she alleged Labor Code violations in her own capacity and on behalf of a putative class, has been held as a different harm than that suffered by the state in the employee's action under PAGA, even though the factual predicate was the same as in the first action

- *Howitson v. Evans Hotels, LLC*, 81 Cal. App. 5th 475, 490-92 (2022) (reversing trial court order that sustained defendant-employer's claim preclusion demurrer, where employee filed a PAGA action with the same underlying facts as a previous action filed for Labor Code violations);
- *Gavriiloglou v. Prime Healthcare Mgm't., Inc.*, 83 Cal. App. 5th 595, 601 (2022), *as modified on denial of reh'g* (Sept. 20, 2022) (Issue preclusion does not apply where the plaintiff is acting in different capacities in an individual arbitration than in a subsequent PAGA representative action in court).

Judicial Update – Waiver

While the right to bring individual claims through PAGA can be waived through arbitration agreements, wholesale waivers of PAGA claims are unenforceable

Johnson v. Lowe's Home Ctrs., LLC, No. 2:21-cv-00087-TLN-JDP, 2022 WL 4387796, *3 (E.D. Cal. Sept. 22, 2022).

- The plaintiff argued that an arbitration agreement that she entered into during her employment constituted an unenforceable wholesale waiver of her PAGA claims.
- The court found that the plaintiff's arbitration agreement did not constitute a wholesale waiver because (1) it only prohibited the plaintiff from seeking relief on behalf of other parties in arbitration and (2) it limited the arbitrator's authority to the resolution of the employee's individual claims.
- There can be no wholesale waiver where the plaintiff still has the right to bring an individual PAGA claim.

Judicial Update – Settlement

- Courts have consistently approved settlements that allocate a relatively small amount of the settlement to PAGA claims. *See, e.g., Avery v. Akima Support Operations, LLC*, No. 2:19-cv-00924-DAD-AC, 2022 WL 4473211 (E.D. Cal. Sept. 26, 2022) (holding that allocating \$5,000 (6.7%) for the PAGA component, out of \$74,500 total settlement amount is “far, reasonable, and adequate in light of PAGA’s public policy goals”).
- More recently, however, courts have denied settlements where the amount allocated to settle the PAGA claim was deemed too small or was non-existent. *See Martinez v. Knight Transportation, Inc.*, No. 1:16-cv-01730-SKO, 2022 WL 14746410 (E.D. Cal. Oct. 25, 2022) (denying motion for preliminary approval of class settlement in part because plaintiff failed to offer a rationale for settling the PAGA claim for the relatively meager fraction of 1.1% of the estimated worth of recovery).
- Courts also may reject portions of the PAGA settlement. *Manzo v. McDonald’s Rests. of Calif., Inc.*, No. 1:20-cv-1175-HBK, 2022 WL 4586236 (E.D. Cal. Sept. 29, 2022) (lowering plaintiff’s requested \$10,000 service award to \$6,000 because (1) there was no evidence that the plaintiff contributed a significant amount of time to the case and (2) \$10,000 was 45 times higher than the average payment for other wronged employees).

Strategies for Employers

Easy Fixes

Frivolous
Claims

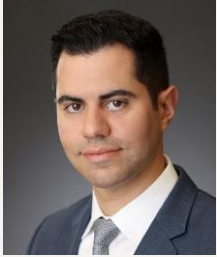
Seemingly
Large
Exposure

Policy Based
Claims



Questions?

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