



**20** EMPLOYMENT LAW  
**24** Conference  
Off to work we go!

***California Wage And Hour Update***  
***(Including The Latest On Meal And Rest Break Requirements)***



# Speakers



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# Quick PAGA Overview

- California’s Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code §2698 et seq. (“PAGA”) was enacted in 2004
- Enlists employees as private attorneys general to enforce California labor law.
- Authorizes any “aggrieved employee” to initiate an action against an employer “on behalf of himself or herself and other current or former employees” to obtain civil penalties that previously could have been recovered only by the State in an enforcement action brought by California’s Labor and Workforce Development Agency (“LWDA”)
- “Representative” claim in two ways:
  - As an agent of the state
  - Representative of other employee penalties

# The Viking River Cruises and Adolph Decisions



# *Iskanian*

- Addressed ability of party to waive right to bring claim under PAGA by virtue of arbitration agreement that includes waiver
- Confirmed state law precludes waiver of PAGA claim because PAGA statute serves a public interest in enforcing Labor Code and incentivizing compliance by employers
- Precludes division of PAGA actions into individual and non-individual PAGA claims
- “We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law.” *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 384 (2014).

## *Viking River Cruises... a lifeline*

- SCOTUS held that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate
- PAGA's built-in mechanism of claim joinder is in conflict with the FAA
- Viking was entitled to compel arbitration of Moriana's individual claim
- Suggested that the state court should dismiss the non-individual PAGA action because Moriana does not have standing

# But Potentially A Short-Lived Lifeline

- Viking River was a victory for employers...any respite from PAGA is a victory for employers.
- But it was not quite a wholesale repudiation of PAGA.
- Left the door open for California courts or the California Legislature to weigh in.

# Three Potential Paths Forward for PAGA

- 1) A **state court** says a PAGA plaintiff does have standing to bring representative PAGA claim even if their individual claim is being arbitrated.
  - Some plaintiffs are arguing that this is the result from *Kim v. Reins International California, Inc.* - a case that held that an aggrieved worker retains standing to pursue PAGA suits even after settling their individual claims.
  - Settlement is a different context than arbitration of PAGA claims.
- 2) The **Legislature** steps in.
- 3) The **public** bans PAGA.



# CA's Response: Adolph v. Uber

## Key Question CA Supreme Court Addressed:

*Whether an aggrieved employee who has been compelled to arbitrate individual claims under PAGA ... maintains statutory standing to pursue non-individual PAGA claims arising out of events involving other employees....*

# Result? Adolph v. Uber

- Yes. A PAGA plaintiff **does** have standing to bring a non-individual PAGA claim even if their individual PAGA claim is being arbitrated.
- Silver Lining? Yes. A little. The Court suggested....
  - That the non-individual PAGA action should be stayed pending the outcome of the individual PAGA claim
  - If the employer wins in individual PAGA arbitration, then the employee should lose standing to pursue the non-individual PAGA claim
  - If the employer loses in individual PAGA arbitration, then the employee continues to have standing to pursue the non-individual PAGA claim

# Adolph v. Uber Technologies

## Takeaways

- Employers will likely still have to face the prospect of non-individual PAGA lawsuits, even if individual PAGA claims are sent to arbitration
- Review your arbitration agreement to ensure it comports with both *Viking River* and *Adolph v. Uber Technologies*

# Relevant Cases Pending Before CA Supreme Court



# Relevant Cases Pending Before the CA Supreme Court

- ***Fuentes v. Empire Nissan, Inc.***, S280256. (B314490; 90 Cal.App.5th 919; Los Angeles County Superior Court; 20STCV35350.) This case presents the following issue: *Is the form arbitration agreement that the employer here required prospective employees to sign as a condition of employment unenforceable against an employee due to unconscionability?*
- ***Turrieta v. Lyft, Inc.***, S271721. (B304701; 69 Cal.App.5th 955; Los Angeles County Superior Court; BC714153.) The Court will issue a limited review of the following issue: *Does a plaintiff in an action filed under PAGA have the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state?*

# What is the Status of Mandatory Arbitration Agreements?

- Signed Oct. 2019, AB51 made it unlawful to require applicants and employees to sign mandatory arbitration agreements.
- Prohibits employer from threatening, retaliating, discriminating against for refusing to sign an arbitration agreement
- Violations could lead to civil and criminal penalties
- Employers subject private claim under FEHA. Gov. Code § 12960
- Set to become enforceable beginning January 1, 2020
- Does not apply to contracts “entered into, modified, or extended” on or before January 1, 2020 (not retroactive)



# The Status of AB51

December 9, 2019: A coalition of business groups led by the U.S. Chamber of Commerce filed a lawsuit seeking to block AB 51 from ever taking effect. 2:19-cv-02456-KJM-DB (ED. Cal)...

February 15, 2023: Ninth Circuit held AB51 is preempted by the Federal Arbitration Act. Affirmed the preliminary injunction prohibiting California from enforcing AB51

***The Court's injunction on AB51's ban on mandatory arbitration agreements remains in effect.***

# What's Next?







## 2024 Ballot Measure

- **California Fair Pay and Employer Accountability Act:**
  - Replaces PAGA with alternative state enforcement.
  - Ensures 100% of penalties go to workers.
  - Speeds up recovery of wage and penalties.
  - Doubles penalties for willful violations.
- Qualified for November 2024 ballot...BUT...



## Legislative Response

- Assembly Bill 2288 and Senate Bill 92
- Limits the types of employees who could bring claims, give employers a better chance to cure mistakes, reduce possible penalties, and boost procedural mechanisms that could reduce claims in court

# Assembly Bill 2288 and Senate Bill 92

- **Reduction of Possible Penalties**

- Up to 85% reduction in penalties for employers who engage in reasonable steps of compliance prior to a dispute arising
- Up to 70% reduction in penalties for employers who take reasonable steps to remedy any potential issues following receipt of a lawsuit
- Reductions are in addition to a reduction from “\$100 per aggrieved employee per pay period” to “\$50 per aggrieved employee per pay period” if the alleged violation “resulted from an isolated, non-recurring event that did not extend beyond the lesser of 30 consecutive days or four consecutive pay periods”
- “All reasonable steps” may include, but are not limited to, “an audit of the alleged violations and taking action in response to the results of the audit, dissemination of lawful written policies as to the alleged violation, training of supervisors on applicable Labor Code and Wage Order compliance, and/or taking correct action with regard to supervisors.”

# Assembly Bill 2288 and Senate Bill 92

- **Heightened Penalties Are Permitted**

- A \$200 per pay period penalty shall be assessed when either any agency or court “within the five years preceding the alleged violation...has issued a finding or determination to the employer that its policy or practice giving rise to the violation was unlawful” or if the court finds the employer’s conduct was malicious, fraudulent or oppressive.

- **Reduction in Penalties for Cured Violations / Curing Paystub Violations**

- Undertaking the required “reasonable steps” could result in not being required to pay a civil penalty for an underlying violation.
- Curing a violation of Labor Code Section 226(a) could result in not being required to pay a civil penalty.
- In all other circumstances where an employer cures using various processes under the legislation but does not take the described “reasonable steps,” any civil penalty shall be no more than \$15 per employee per pay period during the applicable statute of limitations.

# Assembly Bill 2288 and Senate Bill 92

- **Limitations of Potential Penalties For Weekly Payroll**

- One-half the penalties if the employees' regular pay period is weekly rather than bi-weekly or semi-monthly

- **Requiring Same Injuries**

- Limits an individual standing to allowing pursuit of relief for only those employees “against whom a violation of the same code provision was committed”

- **Empowering Courts to Limit Scope of PAGA Claims**

- Codifies trial court's ability to limit evidence at trial and “limit the scope of any claim . . . to ensure that the claim can be effectively tried.”

# Assembly Bill 2288 and Senate Bill 92

- **Preclusion of Various Derivative Penalties**

- Prohibits employee from seeking to combine PAGA penalties for violations of Labor Code Sections 201, 202, 203 and violations of California Labor Code Section 204 that is neither willful or intentional, and/or a violation of California Labor Code section 226 that is neither knowing or intentional nor a failure to provide a wage statement

- **No Retroactivity**

- Reduced penalties will not apply to any pending litigation matters or where notice was given to the LWDA prior to June 19, 2024.

- **Exceptions to Penalty Reduction**

- Allows a court to refuse to apply the limitations if the facts and circumstances of a case warrant or to do otherwise would be unjust, arbitrary, oppressive or confiscatory

# Assembly Bill 2288 and Senate Bill 92

- **Separate Cure Process for Small and Large Employers**

- Within 33 days of receipt of a notice from the LWDA, an employer with fewer than 100 employees
  - May submit a confidential proposal to cure one or more of the alleged violations
  - Process includes a multi-step review process with the LWDA.
  - All communications as part of this process are intended to be privileged settlement communications that could not be introduced in court.
- Employers with 100 or more employees
  - Can seek an early evaluation conference in court once the PAGA lawsuit is filed
  - Multi-step process for a civil court's review of a large employer's cure process

# Assembly Bill 2288 and Senate Bill 92

- Non-Profit Legal Aid Organizations Can Bring Claims For Employees
- Injunctive Relief
- Attorneys' Fees And Costs in Response to “Cure”
- Modification of Penalty Allocation



# Arbitration Agreements and Strategy?



# Strategy Considerations Post-Adolph v. Uber

- **Decisions as to what to do with individual and non-individual PAGA claims?**
  - Most PAGA claims were stayed pending the outcome of *Adolph and* will now be at issue
- **The Post- *Adolph* Litigation Climate:**
  - Do we anticipate an uptick in PAGA filings
  - More fighting on issues the other side may have agreed to in the past?
  - Will the other side stipulate to arbitration of the individual PAGA claims? Will they agree to stay the non-individual PAGA claim?
  - Mediation? Settlement?
  - Arbitration of individual PAGA claims?
  - Will motions be needed to ensure non-individual actions are stayed pending individual PAGA arbitrations?

# Pros: Individual PAGA Claim Arbitration

- Pros
  - If the employer succeeds in the individual arbitration and the win is confirmed by the Court – the individual PAGA plaintiff should lose standing to proceed as a representative in the non-individual PAGA case
  - It stalls out the non-individual PAGA case, precluding an aggressive counsel from conducting broad PAGA discovery, obtaining contact information for aggrieved employees and other discovery
  - Allows you to have input regarding the Arbitrator who may decide more favorably

# Cons: Individual PAGA Claim Arbitration

- Cons

- Expensive – Average arbitration costs \$250,000+
- A negative ruling, especially regarding overarching policies and procedures, may result in “automatic” liability in the non-individual PAGA case
- Increased attorneys’ fees for a Plaintiff’s counsel, which are recoverable, may drive up the valuation of the case
- Employers may be forced to “re-litigate issues”
- Other side may be less inclined to settle once pushed into arbitration

# Individual Settlement Considerations

- If there is an individual settlement of the PAGA claim, certain percentage goes to state and to the individual
  - What's the process?
- Impact of individual PAGA settlements on pursuing the representative PAGA claim?
  - *Kim v. Reins*?

# Should Employers Roll Out New Arbitration Agreements?

- There is nothing, *per se*, in *Adolph* that mandates a new arbitration agreement.
  - Included some revisions in view of *Viking River Cruises* and *Adolph*
- Regardless, employers should ensure their arbitration agreements are up to date with recent revisions:
  - **Exclusion of Sexual Harassment and Assault Claims**
    - Biden signed the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment” Act into law in 2022.
  - **Arbitration Fees**
    - SB 762 went into effect in 2022.
    - Absent an express provision in the arbitration agreement stating the timing of payment of arbitration fees and costs, which the employer must pay, these are due upon receipt.

# Suggested Next Steps – “Triple A”

- Assess: Does Viking/Adolph apply to you?
- Analyze: Does your arbitration agreement need to be updated?
- Act: Roll out arbitration agreements

*Do the Work Now – Timing Will Be Important*

# Are your Arbitration Agreements Up to Date?

*Ensure that your Arbitration Agreements Are Compliant and Can be Enforced!*

- Incorporate the FAA
- Make sure that employees are agreeing to arbitrate their individual-PAGA claims
- Include class action and PAGA waivers
- Address carve out for sexual harassment and assault claims
- Address timing to pay arbitrator's fees
- Consider “voluntary” arbitration agreement

***Include a class action waiver!***



# Why Pay Attention to These Issues

- Arbitration is a strong defense!
- Plaintiffs' attorneys love it
- Results in costly judgments and settlements against major employers for overtime and technical violations
- Statute of limitations and potential back pay: 2-4 years
- Automatic attorney's fees

# Hot PAGA and Class Action Litigation Issues



# Hot PAGA Issues

- Regular rate issues in overtime weeks
  - Bonuses, commissions, dual rates
- Misclassification of workers: contractors vs. employee, exempt vs. non-exempt
- Expense reimbursements
- Meal/rest period compliance
- Off the clock issues
- Wage statements

# How to Avoid Being Sued on These Issues

- Evaluate arbitration and implement agreements
- Audit wage/hour practices and keep privileged information with counsel
- Implement strong meal/rest break compliance SOPs
- Draft strong policies and job descriptions
- Train managers on the pitfalls and impose discipline accordingly
- And stay out of the courthouse!

# I've Received a PAGA Letter . . .



# The Ten Steps

1. Contact labor and employment counsel
2. Audit wage statements
3. Make necessary corrections
4. Determine if a “cure” is warranted
5. Audit timekeeping, payroll records, and practices and alleged violations
6. Determine if the employee is aggrieved
7. File employer’s response with the LWDA
8. Gather counterintelligence
9. Review the employee’s personnel file
10. Assess early settlement

# Step 1: Contact Labor and Employment Counsel

A PAGA notice should immediately prompt you to contact your labor and employment counsel, experienced in handling PAGA actions. There are time limits to cure discreet Labor Code violations, more fully discussed below.

## Step 2: Audit Wage Statements

- You should 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:
  - 1) gross wages earned;
  - 2) total hours worked;
  - 3) the number of piece-rate units earned and the applicable piece rate if the employee is paid on a piece-rate basis;
  - 4) all deductions;
  - 5) net wages earned;
  - 6) start and end dates of the pay period;
  - 7) the name of the employee and the last four digits of their social security number or an employee ID number;
  - 8) the name and address of the employing legal entity; and
  - 9) all applicable hourly rates and the corresponding hours worked at each hourly rate.
- It is worth noting that 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.



## Step 3: Make Necessary Corrections

If you identify problems, you should immediately correct any missing or inaccurate information on the wage statements. Because Labor Code section 226 violations carry the heaviest penalty amount at \$250 for the initial violation and \$1,000 for subsequent violations, correcting the wage statements soon after the PAGA notice will allow you to argue that there are only a few subsequent violations for which penalties may be assessed, if at all.

## Step 4: Determine If A “Cure” Is Warranted

- The Labor Code allows you to “cure” two types of wage statement violations: (1) failure to include either the start or end date of the pay period (Cal. Lab. Code § 226(a)(6)); and (2) failure to provide the name and address of the employing legal entity (§ 226(a)(8)). Where such requisite information is missing from the wage statements, you should strongly consider undertaking the cure option, as there are few viable defenses to such violations. Where such requisite information is inaccurate on the wage statements,
  - you should weigh the cost and benefit of the cure option
  - with your counsel. For example, use of an employer’s
  - unexpired fictitious business name that is properly
  - recorded in California has recently been validated.

# Step 5: Audit Timekeeping and Payroll Records and Practices and Alleged Violations

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

- Do you use a rounding policy?
- Do you automatically deduct time for a meal period?
- Have you ever paid a meal or rest period premium?
- Are employees allowed to leave the premises during meal and rest breaks?
- Are employees paid at their regular rate of pay for overtime?
- Have you strictly complied with requirements if adopting an alternative workweek schedule?
- Do you maintain or cover the cost of maintaining uniforms?

## Step 6: Determine if the Employee is Aggrieved

An employee may seek civil penalties under PAGA on behalf of themselves and other current or former employees so long as they have suffered at least one alleged Labor Code violation. Although this appears to be a low threshold, the applicable statute of limitations as to each claim should be analyzed by counsel. For example, an employee who went on disability leave more than a year before the date of the PAGA lawsuit would not have worked within the past year that would serve as the basis for any meal and rest violations.

# Step 7: File A Brief Employer's Response to PAGA Letter

Although you are not required to file a response addressing the charges in the PAGA notice, standard practice for many counsel is to file a written response with the LWDA. The response should be kept brief without going into any details about any expired statute of limitations or how the alleged facts and theories are deficient. It is sufficient to say that the PAGA notice fails to identify sufficient facts to allow either LWDA or you to conduct an investigation.

## Step 8: Gather Counterintelligence

Because PAGA actions are generally a product of a copious amount of information that has been amassed by the employee's counsel prior to providing the PAGA notice, you should also use counter investigative strategies, such as encouraging employees to report any outside contact inquiring about working conditions, or wage and hour matters. Your investigation should include review of the employee's social media accounts, as well as a comprehensive search of social media for advertising referencing the employee or your organization. This is particularly essential for companies with large workforces, as social media advertisements carry the potential to reach the widest audience.

## Step 9: Review The Employee's Personnel File

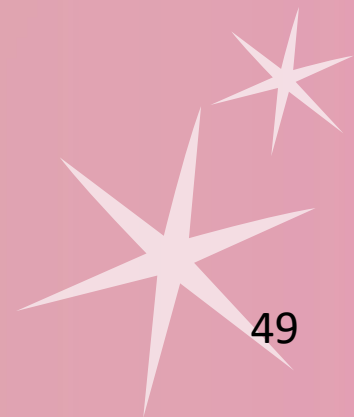
Your call to action is often triggered before you even receive a PAGA notice. In most cases, the employee's counsel will send you a request for the employee's personnel file long before any notice is filed with the LWDA. You should consult a seasoned labor and employment counsel to flag potential wage and hour violations and develop a game plan prior to receiving the inevitable PAGA notice.

## Step 10: Assess Early Settlement

Settlement trends for combined class and PAGA actions show that the cost of buying peace increases as the case progresses. A PAGA-only action without class action component will often be turned into a hybrid class/PAGA action for settlement purposes. Indeed, it makes most sense for employers to obtain the broadest release possible, since the PAGA claims will be based on wage and hour violations that trigger class damages separate from PAGA penalties.



**Oh No . . . I've been sued.  
Now what?**



# The Seven Steps

1. Understanding the Complaint
2. Coordination Within the Company
3. Honest Evaluation
4. Setting the Strategy
5. Dealing with Discovery
6. Considering Settlement
7. Fixing Problematic Practices

# Step 1: Understanding the Complaint

- **Investigate** the allegations
  - What violations are being alleged?
  - Which employees are alleged to be affected?
- Complaint may be intentionally **vague** to keep the putative class as broad as possible until moving for certification.
- Are there groups of employees or potential violations that, while not apparent on the face of the complaint, could be the subject of discovery or of class/collective certification?

## Step 2: Coordination within the Company

- **Coordinate** among departments to ensure that counsel have access to the proper information necessary to investigate and defend the case.
  - Payroll Department
  - Human Resources
  - IT
  - The business line(s) of putative class members
- A class/collective action implicates a broad range of corporate policies, pay practices, management training, actions by individual managers at various levels, and the individual employment circumstances of the named plaintiff(s).

# Step 3: Honest Evaluation

- **Evaluate** the legal merits of the case, which includes:
  - Evaluation of underlying allegations of unlawful conduct
  - Evaluation of class/collective certification strengths and weaknesses
- Consider any **threshold issues** that could short-circuit plaintiffs' case, such as:
  - Arbitration agreements (especially with class waiver)
  - Plaintiffs are not the company's employees
  - Personal jurisdiction issues in putative nationwide class/collective actions
- **Evaluate** the logistical issues in defending a complex wage and hour class/collective action.
  - Accurately maintained records
  - Ability to gather class-wide information
  - Ability to respond to class-wide discovery demands

## Step 4: Setting the Strategy

- Determine company's defenses on the merits of the alleged violations
- Defeating certification
- Limiting the scope of the class
- Early settlement
- **Merge legal strategy** with a big-picture view of the company's business (particularly in our post COVID-19 world) to determine what should be achieved, and how counsel can best go about achieving it.

Always remember:

“Winning” a class/collective action can take many forms

## Step 5: Dealing With Discovery

- Counsel must be attuned with discovery demands **and** the discovery the company should be seeking.
  - For example, a common discovery issue is whether, and to what extent, defendants should be limited to “representative discovery”
- From a litigation perspective, more discovery tends to **benefit defendants**, who are opposing certification by trying to demonstrate differences among the class.
- From a litigation perspective, more discovery tends to benefit defendants, who are opposing certification by trying to demonstrate differences among the class.
- However, in-house and outside counsel must be on the same page as to the benefit of additional discovery versus the cost of such discovery.
- It does the company no good if the value of the discovery sought is outweighed by its costs.

# Step 6: Best Time For Settlement

Counsel should always be on the lookout for the **opportune time to settle**.

- Because class/collective actions often proceed in stages (e.g. pre-certification discovery, class certification briefing, post certification discovery etc.), settlement should be re-evaluated after each stage is complete.
- The results of the previous stage of the litigation often soften the parties' positions.
- For example, plaintiffs and their counsel may accept less after the completion of pre-certification discovery that reveals facts making class certification less likely...
- Or after the company defeats a certification motion (or at least limit's the class/collective granted).
- Settlement that once may have seemed impossible may become much more likely as litigation progresses.



# Step 7: Fixing Problematic Practices

Often, a wage and hour class/collective action will **highlight** that the company is not fully compliant in its wage and hour practices.

- In these circumstances, resolution of the case should also involve prompt action to address any problematic wage and hour practices - both those that are the subject of the litigation, and any others that are uncovered.
- Otherwise, the company will face yet another class/collective action in a few years' time.
- Counsel must weigh how changing pay practices during the pendency of litigation could affect the case. In-house counsel will need to determine the best steps for bringing the business on board in making these (sometimes uncomfortable) changes.



# QUESTIONS?



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Off to work we go!



THANK YOU

