Employee Perspective: PAGA 15 Years Later

By Glenn A. Danas

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Since its initial passage roughly 15 years ago, the Private Attorneys General Act of 2004 (PAGA)[1] has played an increasingly important role in California's enforcement of the Labor Code. A close review of PAGA's amendments, case law interpreting the Act, and the data show that PAGA is necessary as a law enforcement tool, and that claims of its being "out of control" are unfounded. Indeed, these sorts of criticisms have been lodged since PAGA was first enacted, largely unchanging, despite the Legislature's and the courts' responses to PAGA. Moreover, many of the criticisms of PAGA seem to be that it will accomplish the Legislature's goals of remediating and deterring widespread Labor Code violations. However, as district court judge David O. Carter noted in a 2011 PAGA suit, "The Court is not required to withhold the power of the PAGA statute simply because Defendant fears its potential power."[2]

The problem that PAGA was meant to address was that the California economy was continuing to grow exponentially, while the state's ability to police its labor laws was falling further behind with each passing year. To put into perspective how dire the problem of under-enforcement of the state's labor laws had been, a U.S. Department of Labor study in 2003 of Los Angeles's garment industry, which employs over 100,000 workers, estimated the existence of 33,000 "serious and ongoing wage violations by the city's garment industry employers," but California's Department of Industrial Relations was issuing fewer than 100 wage citations *per year* for all industries *throughout the state*.[3] Against this backdrop, the California Legislature, under its historic police powers to enforce laws regarding "wages, hours, and other terms of employment,"[4] determined that supplementing the state's enforcement efforts by deputizing employees who had been subject to alleged Labor Code violations was critical for the state to have any hope of keeping up.

Virtually since its inception, some California businesses and members of the defense bar have attacked PAGA as being unfair to employers; this effort led to PAGA's early amendments in 2004, adding the requirement of administrative exhaustion to the statute. These first amendments were designed to strike a balance by making PAGA suits harder to bring, while at the same time preserving the private attorneys general enforcement regime as a necessary tool to ensure some modicum of Labor Code enforcement.[5] Under the 2004 amendments, a current or former employee wishing to seek civil penalties through PAGA must first send a letter to the LWDA laying out the facts and theories underlying the alleged Labor Code violations, giving the LWDA a certain amount of time to review the charges and evaluate whether to intervene before the employee may file a complaint in court.[6] (This "waiting period" before which an employee may not file a PAGA complaint had initially been 33 days, but was lengthened to 65 days in 2016 pursuant to another set of amendments intended to increase LWDA oversight and involvement.) Likewise, the 2016 PAGA amendments added a requirement that notice of any proposed settlement of a PAGA action be provided to the LWDA, as well as any court order or judgment awarding or denying civil penalties.[7] And the 2016 amendments expanded PAGA's cure provisions, allowing employers the option to cure certain technical violations, such as certain types of wage statement violations, before the plaintiff may file suit.[8]

While PAGA had generally been pleaded only as one of many claims in the context of class action complaints, all of this changed in 2011. In *AT&T Mobility v. Concepcion*,[9] the United States Supreme Court issued a landmark ruling in which it held that class action waivers are enforceable under the Federal Arbitration Act.[10] Unsurprisingly, following *Concepcion*, many employers inserted class action waivers into their mandatory arbitration provisions, thereby eviscerating the ability of many California employees to sue their employers on an aggregate basis (often the only way to sue them at all, as a practical matter). PAGA, however, offered an alternative avenue for employees to seek to vindicate rights underlying the Labor Code, and PAGA actions (particularly "pure PAGA" actions with no wage claims alleged) increased seemingly overnight.

After *Concepcion*, with PAGA having taken on greater prominence in wage and hour litigation, employees and employers engaged in a ferocious battle to determine the contours of the Act, since few of the important aspects of litigating such claims had been established.

- Are PAGA claims subject to forced, individual arbitration? "No," the California Supreme Court unanimously answered in *Iskanian v. CLS Transportation Los Angeles, LLC*,[11] a case I argued on behalf of the plaintiff at each level of California's courts. The *Iskanian* court held that PAGA is a type of qui tam suit, involving public rights, and that such disputes are really between the employer and the state. Since the state had not consented to arbitration, and the FAA had never been held to require arbitration of public statutory rights, purported "PAGA waivers" were held to be unenforceable.
- Since employers believed that *Iskanian* might not apply in federal court, the next front in the PAGA litigation battle was over removeability and federal jurisdiction. Are PAGA suits subject to removal under the Class Action Fairness Act (CAFA)? "No," answered the Ninth Circuit in *Baumann v. Chase Inv. Servs. Corp.*,[12] reasoning that CAFA applies only to class actions and that PAGA, lacking notice, opt-out rights, certification, or the ability to seek damages, was not sufficiently analogous to class actions such that CAFA might apply.
- Can civil penalties of the non-party aggrieved employees be aggregated to satisfy the statutory amount-in-controversy requirement to establish traditional diversity jurisdiction? "No," the Ninth Circuit again answered, in *Urbino v. Orkin Servs. of Cal.*,[13] reasoning that claims for civil penalties under PAGA are individual, not collective, rights.
- Does *Iskanian*'s rule against permitting PAGA waivers apply in federal court? "Yes," the Ninth Circuit in *Sakkab v. Luxottica Retail N. Am., Inc.*,[14] held, reasoning that PAGA arbitration, unlike class arbitration, was procedurally straightforward and therefore did not offend "fundamental attributes of arbitration."
- Is a PAGA plaintiff entitled to discovery of the names and contact information of non-party aggrieved employees, on whose behalf he or she is prosecuting the case? "Yes," held a unanimous California Supreme Court in *Williams v. Super. Court*,[15] reasoning that in PAGA, just as other litigation, the California Discovery Act permits liberal discovery, and, since the employer has this information, it is only fair that the plaintiff have it as well.

Without the ability to force employees to waive PAGA claims, and with minimal discovery rights for PAGA plaintiffs having been established, some employers and defense counsel have continued to lament PAGA. Notably, however, numerous issues have cut in favor of employers over PAGA's first 15 years, and against any notion that PAGA is "out of control." For instance, the majority of PAGA trials seem to have resulted in very modest awards, particularly due to trial courts' exercising their discretion under Labor Code § 2699(e)(2), which allows a court to award less than the maximum amount of civil penalties upon a finding that, applied to that case, it would be "unjust, arbitrary and oppressive, or confiscatory" to do so. Thus, in one PAGA trial where liability was found by a jury for improper wage statements, $5,845,250, the maximum amount of civil penalties, was reduced by the court to $350,835 under § 2699(e)(2) upon a finding that the employer's violations had not been willful.[16] This was roughly a 94% reduction, and is by no means aberrant.[17]

Likewise, the California state and federal courts have generally held plaintiffs to the somewhat difficult task of filing an LWDA notice letter

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with sufficient detail prior to initiating suit and prior to any fact discovery, with inadequate letters providing a basis for later dismissal of the suit.[18] Further, even after the California Supreme Court's *Williams* decision, California trial courts routinely deny in whole or in part PAGA plaintiffs' discovery motions (or grant defendants' protective orders) pursuant to the courts' desire to sequence discovery "in a logical manner, so that it can be conducted efficiently and economically."[19] Moreover, where the facts of the case warrant it, numerous courts have struck or otherwise limited PAGA claims on manageability grounds, despite the absence of any "manageability" requirement in the PAGA statute.[20] And if the intermediate appellate court's decision in *Kim v. Reins International California*,[21] allowing defendants to divest PAGA plaintiffs of standing by making individual settlement offers pursuant to CCP § 998, is upheld by the California Supreme Court, the *Iskanian* rule may be substantially undermined.

In November 2018, defense counsel, on behalf of the California Business & Industrial Alliance (CBIA), sued California alleging that PAGA is unconstitutional on numerous bases, including the Eighth, Fifth, and Fourteenth Amendments of the U.S. Constitution and art III, section 3 of the California Constitution (based on the principle of separation of powers).[22] As an initial matter, the California Supreme Court rejected this separation of powers argument in *Iskanian*, in 2014, rejecting the notion that PAGA is an unconstitutional delegation of the executive's duty to prosecute claims on the state's behalf without sufficient governmental supervision, or an unconstitutional overstepping of the Legislature into the judiciary's realm.[23] Indeed, the *Iskanian* court correctly noted that, if this challenge had been well-taken, it would apply not only to PAGA "but to all qui tam actions, including California's False Claims Act[24], which authorizes the prosecution of claims on behalf of government entities without government supervision."[25]

Also, the CBIA suit is predicated on numerous false assumptions or misleading statements. For instance, the complaint alleges that during the "vast majority of mediations," counsel does not "consult with the State before agreeing to a settlement of PAGA claims."[26] However, the PAGA statute has a procedure in place for providing the LWDA with separate notice of proposed and approved PAGA settlements, and does not contemplate involving the LWDA at mediations.[27] The CBIA suit also contends that "very little" of wage and hour settlements is "allocated to PAGA in the end."[28] Elsewhere in the CBIA complaint, it states that plaintiff's attorneys use PAGA to "extract billions of dollars in settlements."[29] Aside from the inconsistency between these two unsupported statements, neither is true. According to data obtained from the LWDA via a California Public Records Act request, in 2014 the state received $7.02 million in civil penalties through PAGA, from 528 separate settlements, and in 2015 the state received $7.64 million from 649 settlements.[30] The mean payment to the state in 2014 was $13,299, and in 2015 was $11,775.[31] Although the LWDA only produced partial data for 2016 and 2017, the mean civil penalties payments for those two years was $35,388 and $43,288 respectively.[32]

In short, the CBIA suit appears to be a directed more at the Legislature than at the courts, as it reads like a scattershot listing of gripes with the PAGA process as a whole, and qui tam litigation more generally, rather than a legal challenge focused on constitutional infirmities. I would be surprised if this suit progresses far.

The critics of PAGA have long been making the same arguments, that PAGA is wielded without sufficient oversight by plaintiffs' attorneys, that it provides too much leverage to employees, that it facilitates "fishing expeditions," and the like. But these are the same arguments that have long been made against all types of aggregate litigation, and moreover, appear to be unfounded as against PAGA. However, given that PAGA has been interpreted in a reasonable way by the courts, has been appropriately amended from time to time by the Legislature, and has resulted in civil penalties that appear to be neither "business destroying" nor negligible in amount, PAGA is not in need of any dramatic modifications.

ENDNOTES

1. Cal. Lab. Code §§ 2698–2699.6. PAGA was initially passed in 2003, but substantially amended in 2004.
2. *Cardenas v. McLane Foodservice, Inc.*, No. SACV 10-473 DOC (FFMx), 2011 U.S. Dist. LEXIS 13126, *13 (C.D. Cal. Jan. 31, 2011).
3. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 379 (2014).
4. *Id.* at 388 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985).
5. *Dunlap v. Superior Court*, 142 Cal. App. 4th 330, 338-9 (2006) (noting that "the amendment was designed to improve PAGA by allowing the Labor Agency to act first on more 'serious' violations such as wage and hour violations and give employers an opportunity to cure less serious violations. The bill protects business from shakedown lawsuits, yet ensures that labor laws protecting California's working men and women are enforced—either through the Labor Agency or through the courts.").
6. *See* Cal. Lab. Code § 2699.3.
7. SB 836, effective June 27, 2016.
8. *See* Cal. Lab. Code § 2699(d).
9. 563 U.S. 333 (2011).
10. 9 U.S.C. §§ 1–14 (1925).
11. 59 Cal. 4th 348 (2014).
12. 747 F.3d 1117 (9th Cir. 2014).
13. 726 F.3d 1118 (9th Cir. 2013).
14. 803 F.3d 425 (9th Cir. 2015).
15. 3 Cal. 5th 531 (2017).

16. *Parr v. Golden State Overnight Delivery Serv., Inc.*, No. RG12-618103 (Alameda Sup. Ct. July 10, 2014).
17. *See also*, *Fleming v. Covidien, Inc.*, No. ED CV10-01487 RGK (OPx), 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. Aug. 12, 2011) (finding defendant liable for issuing defective wage statements, but reducing civil penalties assessed from $2.8 million to $500,000 pursuant to Cal. Lab. Code § 2699(e)(2)); *cf. In re Taco Bell Wage and Hour Actions*, No. 1:07-cv-01314-SAB, 2016 U.S. Dist. LEXIS 48555 (E.D. Cal. April 8, 2016) (awarding no civil penalties pursuant to PAGA notwithstanding a jury verdict in favor of the plaintiff as to liability for underpaid meal premiums for short or missed meal breaks, because plaintiffs had not proven the precise number of violations with certainty).
18. *See, e.g.*, *Brown v. Ralphs Grocery Co.*, 28 Cal. App. 5th 824 (2018) (affirming trial court's dismissal of claims not disclosed in original LWDA letter, rejecting relation back and equitable tolling to save such bases for PAGA claim); *Khan v. Dunn-Edwards Corp.*, 19 Cal. App. 5th 804, 809-10 (2018) (affirming summary judgment in favor of employer on representative PAGA claims where LWDA letter failed to reference any group of aggrieved employees); *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1057 (9th Cir. 2015) (affirming summary judgment in favor of employer where LWDA letter was merely "legal conclusions" and lacked factual allegations or precise legal theories).
19. *See Valenzuela v. URGP, LLC*, No. BC622088 (L.A. Sup. Ct., Dec. 5, 2017).
20. *Ortiz v. CVS Caremark Corp.*, No. C -12-05859 EDL, 2014 U.S. Dist. LEXIS 36833 *10-12 (N.D. Cal. Mar. 19, 2014) (striking PAGA claim for business expense reimbursement for car mileage where the claim, in the court's view, would have required individual inquiries).
21. 18 Cal. App. 5th 1052 (2017).
22. *See CBIA Files Lawsuit Against California Over Paga*, available at https://www.cabia.org/cabia-files-lawsuit-against-california-over-paga/.
23. *Iskanian*, 59 Cal. 4th at 389-90.
24. Cal. Gov't. Code §§ 12650–12656.
25. *Iskanian, supra* at 390.
26. CBIA complaint, p. 34, ¶101(b).
27. Cal. Lab. Code § 2699(*l*)(2) and (3).
28. CBIA complaint, p. 34, ¶101(d).
29. *Id.* at p. 3, ¶4.
30. Documents obtained are on file with the author.
31. *Id.*
32. *Id.*