

### Will Calif. High Court Take On PAGA Unmanageability?

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Manageability – the notion that a Private Attorneys General Act suit must be capable of being tried in a realistic manner – has become a strong new defense against unwieldy PAGA claims.

However, due to a recent district split, the California Supreme Court may soon determine the amount of authority trial courts have to dismiss PAGA claims on manageability grounds.

#### **Manageability and the Private Attorneys General Act**

PAGA deputizes employees who go through pro forma procedural steps to sue employers for California Labor Code violations as a proxy for the state. These employees use PAGA as a procedural vehicle to recover civil penalties, 75% of which go to the state, with the remaining 25% going to the group of allegedly aggrieved employees, in addition to attorney fees.

PAGA actions have become extremely attractive to the plaintiffs bar due largely to the availability of attorney fees for prevailing or settling plaintiffs. PAGA litigation also does not carry some of the procedural hurdles faced by plaintiffs in class action litigation.

For instance, an employee can bring a PAGA claim seeking penalties for labor code violations he or she did not even experience – so long as the employee experienced at least one labor code violation.

For example, suppose an employee claims she was not paid the overtime wages she was owed. That employee could seek civil penalties for the violation of the labor code section governing overtime pay, as well as any other labor code claim for which civil penalties are available under PAGA – regardless of whether she experienced any of those other labor code violations herself.

Moreover, although class action waivers are enforceable, California courts will not presently enforce PAGA waivers contained in employers' arbitration agreements, although that may be set to change.[1]

In addition, California courts have declined to impose any obligation on PAGA plaintiffs to certify the group of allegedly aggrieved employees, bypassing many of the procedural protections that exist in class actions.

Despite the nearly limitless standing conferred upon PAGA plaintiffs, and the lack of procedural safeguards that protect defendant employers, PAGA plaintiffs must at least prove each and every labor code violation alleged in

order to recover civil penalties. To do so, plaintiffs have often sought to use representative evidence.

However, employers have argued that utilizing representative evidence interferes with their due process rights by limiting their ability to defend the plaintiff's claimed labor code violations using individualized evidence.

Depending on the nature of the claimed violations, representative evidence also often fails to meet the plaintiff's threshold burden of proving each and every alleged labor code violation to recover civil penalties.

Two recent California Court of Appeal cases addressed these considerations in the context of trial court management of PAGA actions.

## **Wesson v. Staples the Office Superstore LLC**

Wesson was the first published California appellate case to address trial manageability in the PAGA context.

There, an employee asserted class claims and derivative PAGA claims on the theory that Staples uniformly misclassified its store managers as exempt executives because they allegedly did not meet the requirements for the executive exemption. The claims were asserted on behalf of 346 managers who worked at dozens of different stores.

Staples argued there was no uniform misclassification because of the wide variation among its stores and in the mix of job duties different store managers performed, such that a class trial would devolve into more than 300 mini trials on whether the exemption applied. In other words, Staples argued that any sort of collective trial would be unmanageable.

The Los Angeles County Superior Court denied certification of the plaintiff's class claims on the basis they were not susceptible to common proof or resolution on a classwide basis. Staples then moved to strike the plaintiff's PAGA claim, invoking the court's inherent authority to manage the case.

The plaintiff argued that the trial court's denial of class certification on manageability grounds was irrelevant to his PAGA claim since proof of manageability was not required to support a PAGA claim under the 2009 case in the California Supreme Court, *Arias v. Superior Court*. *Arias* had held that a PAGA plaintiff need not satisfy traditional class action requirements.

The trial court disagreed with the plaintiff, and invited him to present a trial plan showing how the case could be tried manageably while respecting Staples's right to fully present its affirmative defenses.

The plaintiff argued that his burden, if any, was limited to establishing that the class members uniformly were treated as exempt, and that it was up to the defendant to figure out how to manageably establish its exemption defense.

Staples, in turn, argued that to fully assert its defense, it would need to present evidence of each of its 150 stores' circumstances and each of the 346 managers' particular work styles to establish whether any individual qualified for the exemption, which would take years of court time.

The court concluded that the plaintiff failed to provide a workable trial plan, and granted Staples' motion to

strike the plaintiff's PAGA claim as unmanageable.

On Sept. 9, 2021, the California Court of Appeal's Second Appellate District affirmed the trial court's decision in full. The appellate court further held that trial courts have inherent authority — not derived from class action procedures — to strike claims that would be unmanageable to try.

The court also noted that manageability is a salient concern in PAGA litigation, where a "claim can cover disparate groups of employees and involve different kinds of violations raising distinct questions," and that the same manageability issues can arise from affirmative defenses as from an element that is part of the plaintiff's burden of proof.

## **Estrada v. Royalty Carpet Mills Inc.**

In Estrada, the plaintiff alleged class and PAGA claims stemming from alleged meal and rest period violations. The PAGA claim addressed by the court involved two locations representing 216 employees.

The Orange County Superior Court certified two classes, and the case proceeded through trial. Following trial, the court decertified one of the meal period classes and dismissed the portion of the PAGA claim that was based on the meal period violations because individualized issues made the claim unmanageable.

The plaintiffs appealed, arguing that the trial court should not have dismissed any portion of the PAGA claim on manageability grounds as manageability is not a PAGA requirement.

The Fourth Appellate District held on March 23 that imposing a manageability requirement onto PAGA claims would be akin to grafting statutory class action procedural requirements into representative PAGA claims, which is inconsistent with prior California decisions holding that PAGA plaintiffs need not meet class certification requirements.

However, the appellate court — recognizing that "[s]ome PAGA claims involve hundreds or thousands of alleged aggrieved employees, each with unique factual circumstances" — was careful to note that trial courts do, in fact, have authority to control unwieldy PAGA suits.

For instance, trial courts may: (1) limit witness testimony or other evidence; (2) limit the amount of penalties plaintiffs may recover; and (3) require the plaintiff to establish an efficient way to prove the alleged labor code violations — or risk minimal recovery.

In other words, the Estrada court suggested that trial courts may deal with unmanageable PAGA claims by, e.g., reducing PAGA penalties.

## **What's Next**

While the Wesson and Estrada courts addressed manageability in different ways, the cases involved different facts and circumstances. Wesson involved a larger group of employees spanning more locations than Estrada.

Wesson also involved different claims — allegedly misclassified managers — that would require an inordinate amount of trial time, given the individualized assessments that would be necessary. Estrada, on the other hand,

involved fewer employees and different claims.

The disagreement between the Fourth and Second District Courts of Appeal in Estrada and Wesson sets the case up for potential review in the California Supreme Court, and the employer in Estrada has sought review in the state high court on the manageability issue.

Whether the Supreme Court will grant review may not be known for several months. In the event the state high court denies review, trial courts will have the task of deciding whether to follow Wesson or Estrada. The differences between Wesson and Estrada in the number of employees and locations and fundamental nature of the claims may provide one basis on which trial courts will make that determination.

Wesson involved more allegedly aggrieved employees and more locations at which the employees worked across the state than Estrada. Faced with hundreds of different employer locations and hundreds or even thousands of allegedly aggrieved employees, a trial court may find Wesson's approach of striking the PAGA claim to be far more realistic and practical.

In addition, even where the plaintiff may purport to be able to prove his case through common proof, the application of Wesson may be more appropriate to preserve the defendant's due process right to present individualized circumstances.

Regardless, employers facing PAGA claims should continue to assess whether the alleged labor code violations can be manageably tried. Where appropriate, California employers can and should assert a manageability defense early and consistently as the case progresses. The manageability defense should be top of mind from a case's inception.

Wesson's solution to unmanageable PAGA claims – i.e., striking the claim – can generally be applied at any stage of the proceeding. A defendant need not wait until trial to address an unmanageable claim, as Estrada appears to require. Thus, an employer should consider raising the defense early in the case, including in a responsive pleading if appropriate.

If the case progresses and discovery reveals a basis for a manageability defense, the defense should be raised then.

As trial approaches, plaintiffs – who carry the burden of proving an action is manageable – should be required to provide a realistic plan demonstrating how the action can be manageably tried. A PAGA plaintiff's failure to do so may be fatal to their claim.

Employers facing unmanageable PAGA claims should stay apprised of new developments in this rapidly evolving area.

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[1] The United States Supreme Court is currently reviewing this rule in *Viking River Cruises, Inc. v. Moriana*.

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## Practice Areas

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