Defending California Wage and Hour Litigation Amid New Legislation and Court Decisions
Navigating PAGA Claims, Joint Liability for Misclassification, and Wage and Hour Violations

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1pm Eastern    | 12pm Central    | 11am Mountain    | 10am Pacific

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Defending California Wage and Hour Litigation Amid New Legislation and Court Decisions

PAGA: The Basics & Initial Strategy
Removal, Arbitration & Exhaustion

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California’s Private Attorney General Act
“PAGA”
PAGA – The Basics

• PAGA provides “aggrieved employees” with a private right of action against an employer to collect penalties on behalf of the state’s Labor and Workforce Development Agency (LWDA).

• Most Labor Code (or Wage Order) violations can form the basis of a PAGA claim.

• An “aggrieved employee” can bring collective PAGA action on behalf of all other “aggrieved employees” of employer.
PAGA – The Basics (cont’d)

- PAGA provides for attorney’s fees to the employee who successfully brings the suit.
- PAGA claims are subject to a one-year statute of limitations.
PAGA Procedure - Federal Court Removal

• The Ninth Circuit has made removal of PAGA claims to federal court unlikely.

• Urbino v. Orkin Services of California, Inc., 726 F.3d 1118 (9th Cir. 2013)

• Baumann v. Chase Inv. Services Corp., 747 F.3d 1117 (9th Cir. 2014)

• Yocupicio v. Pae Group, 795 F.3d 1057 (9th Cir. 2015)
PAGA Procedure - Arbitrability

• In California state court – PAGA representative actions cannot be avoided through arbitration agreements with class action waivers

• *See Iskanian v. CLS Transp.*, 59 Cal. 4th 348 (2014)
PAGA Procedure – Arbitrability (cont’d)

• The Ninth Circuit recently decided that the Iskanian rule applies in federal courts as well.

• See Sakkab v. Luxottica, __ F.3d__, 2015 WL 5667912 (9th Cir. 2015)

• In Sakkab, the Ninth Circuit rejected the argument that Iskanian rule precluding PAGA waivers was pre-empted by the Federal Arbitration Act.
PAGA – Administrative Exhaustion

• *Alcantar v. Hobart Service*, 800 F.3d 1047 (9th Cir. 2015)

• Written notice to the LWDA and the employer is required to initiate a PAGA action.

• The notice must contain sufficient facts and theories to support claims.
DEFENDING CALIFORNIA WAGE AND HOUR LITIGATION AMID NEW LEGISLATION AND COURT DECISIONS – PAGA: DISCOVERY, LEGAL STANDARDS, MANAGEABILITY AND RECOVERY

BY LESLIE ABBOTT
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PAGA DISCOVERY

- PAGA statute does not address discovery.

- Court limitations on discovery in PAGA actions:
  - *Fields v. QSP, Inc.*, 2012 WL 2049528 (C.D. Cal. June 4, 2012) (reversing magistrate’s order entitling PAGA plaintiff to discovery as “contrary to law” where plaintiff had failed to comply with Rule 23 requirements);

  - *Williams v. Superior Court*, 236 Cal.App.4th 1151 (2015), *review granted* (upholding trial court’s refusal to order statewide discovery in a PAGA action and observing that “[p]laintiff’s proposed procedure, which contemplates jumping into extensive statewide discovery based only on the bare allegations of one local individual having no knowledge of the defendant’s statewide practices would be a classic use of discovery tools to wage litigation rather than facilitate it”).
Discovery limitations based on location:

- *Currie-White v. Blockbuster, Inc.*, No. C09-2593 MMC (MEJ), 2010 U.S. Dist. LEXIS 47071, at *9-11* (N.D. Cal. Apr. 15, 2010) (PAGA seats action; court restricted discovery to two stores where plaintiff worked plus ten stores where employees who held the same job as plaintiff worked);

- *Franco v. Bank of America*, No. 09cv1364-LAB (BLM), 2009 U.S. Dist. LEXIS 111873, at *2, *10-11* (S.D. Cal. Dec. 1, 2009) (declining to require disclosure of contact information beyond three locations where plaintiff worked);

State court: PAGA claims are representative actions; class action requirements do not apply. *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).

However, at the plaintiff’s election, PAGA claims may be brought as class claims. *Arias*, 46 Cal. 4th at 981, n.5.

Federal court: split exists over whether Rule 23 applies.

Majority of cases hold that a PAGA action may proceed outside of Rule 23 procedures:

- *E.g., Varsam v. Laboratory Corp. of America, 2015 WL 4624111, at *5-6 (S.D. Cal. Aug. 3, 2015)* ("A majority of the district courts have followed [the California Supreme Court’s decision in] Arias and held that representative claims brought under PAGA are sufficiently different from class action lawsuits and do not need certification under Rule 23. . . . The Court agrees with the majority view that a PAGA claim is not governed by Rule 23.");

- *Achal v. Gate Gourmet, Inc., 2015 WL 4274990, at *13 (N.D. Cal. July 14, 2015)* ("Although the Ninth Circuit has not yet decided whether class certification under Rule 23 is required to bring a representative PAGA claim in federal court, the majority of courts in this district that have addressed the issue have held that ‘representative PAGA claims need not be certified under Rule 23 to proceed’ . . .").
PAGA MANAGEABILITY

- PAGA representative status may be denied where the trial would be unmanageable:
  - *Amey v. Cinemark USA, Inc.*, 2015 WL 2251504, at *1, *16 (N.D. Cal. May 13, 2015) ("[W]hen the evidence shows, as it does here, that numerous individualized determinations would be necessary to determine whether any class member has been injured by Cinemark’s conduct, then allowing a [PAGA] representative action to proceed is inappropriate.");
  - *Litty v. Merrill Lynch & Co., Inc.*, 2014 WL 5904904, at *3 (C.D. Cal. Nov. 10, 2014) (striking PAGA allegations; “The circumstances of this case make the PAGA claim unmanageable because a multitude of individualized assessments would be necessary.");
  - *Ortiz v. CVS Caremark Corp.*, 2014 WL 1117614, at *3-5 (N.D. Cal. Mar. 19, 2014) (denying representative status based on unmanageability);
The death knell doctrine is an exception to the one final judgment rule and permits appeal of an order in class actions.

Issue: does the death knell doctrine apply to representative PAGA claims?


- *Munoz v. Chipotle Mexican Grill, Inc.*, 238 Cal. App. 4th 291 (2015), *review denied* (disposing appeal; trial court’s order denying plaintiffs’ class certification motion and granting Chipotle’s motion to deny class certification is a nonappealable order because the PAGA claims remain in the trial court and there is a potential recovery of significant penalties so “death knell” doctrine does not apply under these circumstances).
How are PAGA penalties distributed when they are recovered?

- Courts have discretion to reduce PAGA penalties.

- It is generally understood that the 25% recovery goes to the plaintiff and the aggrieved employees. *E.g., Garrett v. Bank of Am.*, WL 1648759, at *7 (N.D. Cal. Apr. 24, 2014) (“The language [of Section 2699] indicates that all persons against whom a violation was committed, rather than only the representative plaintiff who brings the action, recover a share of 25 percent of the total penalties.”).

Defending California Claims for Willful Misclassification of Independent Contractors and Joint Employer Liability

Presented by Cheryl D. Orr
Overview

- What Is At Stake?

- Are the Workers at Issue Independent Contractors or Employees?

- If Employees, How is Joint Employer Liability Determined?
California Law: Employees or Independent Contractors?

- State Agencies Most Involved Are the EDD and DLSE.

- Focus is on Control and Additional Factors.

Federal Law: Employees or Independent Contractors?

- Under the FLSA, “Employ” Means to “Suffer or Permit to Work.”

- Administrator’s Interpretation No. 2015-1.

- NLRB Applies a Multi-Factor Common Law Test.

- Developments In the Case Law.
Impact and Practical Application

- DOL Enforcement Efforts Have Increased and Attorneys/Courts Will Also Look to the New Interpretation.
- Employers Should Reassess the Classifications of Their Contingent Workforces as well as Tease Out the Differences between Federal and State Interpretations.
- If Issues, Work with your Counsel to Properly Classify in a Manner That is Least Disruptive to Your Business and Minimizes Potential Exposure.
Joint Employer Liability

- **California Law**
  - *Martinez v. Combs*
  - *Patterson v. Domino’s Pizza, LLC.*
  - Labor Code § 2810.3

- **Federal Law**
  - “Suffer or Permit” Standard
  - Focus on “Economic Realities”
  - *Carillo et al. v. Schneider Logistics et al.*

- **NLRB**
  - *Browning-Farris*, 362 NLRB No. 186
Where Do We Go From Here: Unanswered Questions

1) Which Definition Applies When Determining Which Class to Certify?

2) Which Industries Are Most Impacted?

3) What Can Employers Do to Protect Themselves?
How Can Employers Protect Themselves?

- Compliance Does Not Stop With Just “Your” Employees.
- Review Business Partners.
  - Staffing Agencies
  - Vendors
  - Contractors
  - Franchisors/Franchisees
- Examine Potential “Co-Employers”” Ability to Pay.
- (Re)assess Business Models.
Thank You

- Questions/Comments?

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