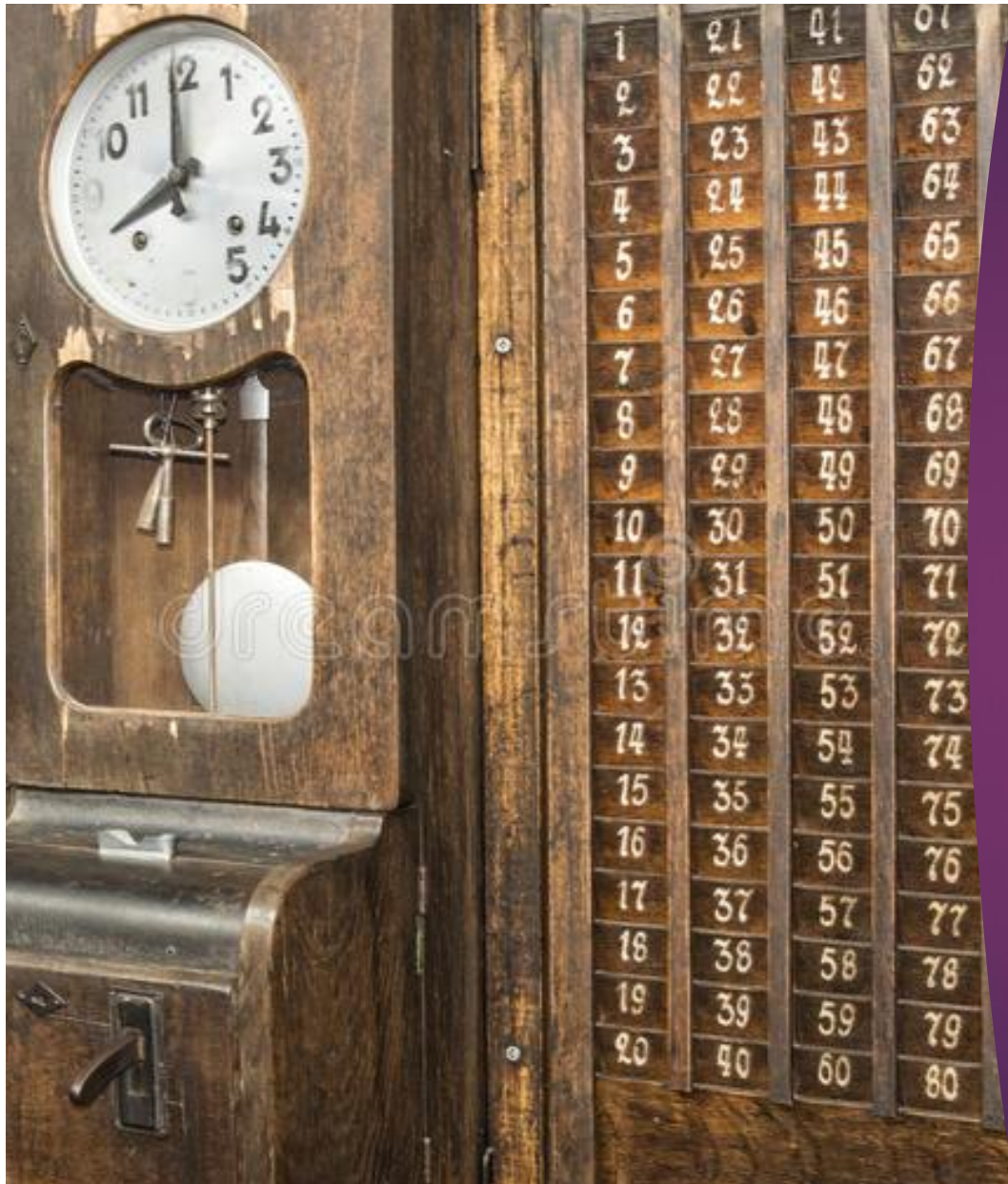


Recent Developments in Wage and Hour PAGAs & Class Actions

Strategies for Defense and Settlement

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Recent developments

Strategies for
settlement and
managing fees & costs

Quick Review: § 2699

- ▶ EE prosecutes on behalf of aggrieved EEs and as proxy for LWDA under Labor Code sections empowering LWDA to collect penalties
- ▶ 75% to LWDA; 25% to aggrieved EEs
- ▶ EE recovers atty fees and costs
- ▶ One year SOL



Limited to “Civil Penalties” Available to LWDA

- ▶ **NOT** the Labor Code statutory damages or penalties available in non-PAGA claims
 - ▶ E.g. Section 203 (termination pay) is a statutory penalty (not PAGA penalty)
- ▶ **NOT** compensatory damages like unpaid wages
- ▶ Usually a flat penalty (\$100/\$200)



California vs. Employer

Designed to benefit the general public
-- **NOT** the party suing

Two Criteria
for standing
to pursue
PAGA as
Aggrieved
Employee

1. Employed

2. Suffered a
violation

Critical Advantage for
Defendants:

No PAGA jury trials

LaFace v. Ralph's Grocery Co.



Class actions
require jury
trials



“Did Defendant’s policies
or procedures cause all
or substantially all class
members to suffer a
violation?”

Recent PAGA Cases:

Who's an aggrieved employee?

About half of them

How many people work here?



If Plaintiff suffered violations that are not barred under SOL, is she aggrieved?

AGGRIEVED

Maxim Healthcare Serv. Inc. (2021) 66 Cal.App.5th 924

What about a Plaintiff who settles individual claim?

AGGRIEVED

Cal. 5th 73

PAGA Standing Survives Settlement

Howitson v. Evans Hotel LLC (2022)

- ▶ Judgment for P “in her individual capacity” (accepted 998 offer)
- ▶ P sues as PAGA rep
- ▶ Court sustains demurrer (precluded)
- ▶ DCA reverses because PAGA remedies harm to the State (real party) and the public

PAGA Standing Survives EE Arbitration

Gavriiloglou v. Prime Healthcare Mgmt. Inc. (2022)

- ▶ P sues for Labor Code violations & PAGA
 - ▶ MTCA granted (PAGA stayed)
 - ▶ Arbitrator finds no violations
- ▶ Court confirms arbitration award; enters judgment on PAGA
- ▶ DCA reverses because P is suing in different capacity, asserting different rights



Implications
for
arbitrations --
Gavriiloglou

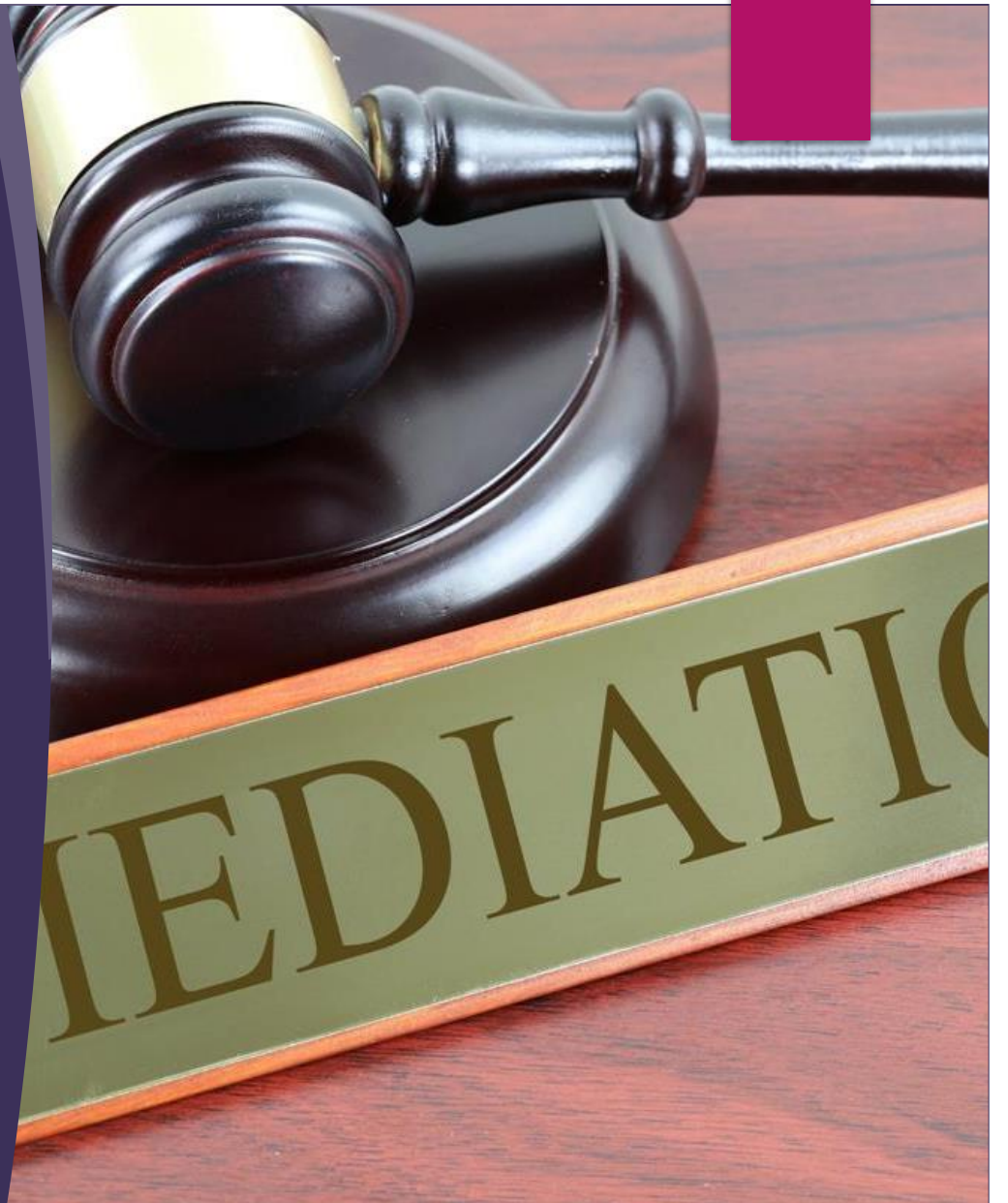
Winning individual
arbitration doesn't
insulate Defendant from
PAGA

Strategies for Managing Defense Costs

- ▶ Skip MTCAs, ask for early bifurcated bench trial on standing
 - ▶ defer Bel Aire process
 - ▶ bifurcate discovery (plaintiff only)
- ▶ Advantage: always yields a decision (unlike MSJ)
 - ▶ Minimal investment (P & D)
 - ▶ Opportunity to win on law or facts (P & D)
 - ▶ Win for P precipitates a settlement

Other Strategies for Managing Defense Costs

- ▶ Early mediation
 - ▶ Limits defense costs
 - ▶ Buys peace & claim preclusion (at a discount?)
 - ▶ Assumes Plaintiff can prove standing



Another Strategy for Managing Defense Costs

- ▶ Hold out for a bench trial
 - ▶ High penalties unlikely
 - ▶ May yield favorable last-minute settlement
 - ▶ Deters serial filings





Three Recent Cases

Can competing PAGA Plaintiffs intervene/object to motions for approval of PAGA settlement?

Turrieta v.
Lyft



Review Granted!

First settlement ent
extinguish claims.

plaintiff cannot
intervene/object to settlement

No standing because state's
rights rather than intervenor's
rights at issue

*Uribe v. Crown
Building
Maintenance
Co.*



Contra Turrieta

Parallel plaintiff can object to settlement that covers violations not asserted in settling plaintiff's notice to LWDA

Moniz v. Adecco



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Rejects *Turrieta*

Parallel Plaintiff
probably can
intervene and
object to
settlement in
overlapping case.

Strategies for Avoiding PAGA Objectors

- ▶ Track and ensure disclosure of all pending “related” cases
 - ▶ File notices of related cases regardless of venue
- ▶ Avoid “reverse auctions” (insist on global mediations)
- ▶ Sign a bulletproof agreement



Class and PAGA Settlements

Approval of Class Action Settlement: Is It Fair, Adequate and Reasonable?

- ▶ Strength of Plaintiff's case on the merits vs. amount of settlement
- ▶ Amount of the settlement
- ▶ Risk/expense/duration of trial
- ▶ Extent of discovery
- ▶ Counsel's experience
- ▶ Reaction of the class

No Statutory
Standard for
Approval of
PAGA Only
Settlements

COURT “SHALL
REVIEW AND
APPROVE ANY
SETTLEMENT OF ANY
CIVIL ACTION FILED
PURSUANT TO THIS
PART” (§ 2699 (L)(2))



Is it fair, reasonable, and
adequate?
(Govt. Code § 12652 (qui tam))

Is it fair to those affected?
Williams v. Sup. Ct.

Biggest Problem in Class Action Settlements

- ▶ Inadequate *Dunk/Kullar* Analysis
 - ▶ Incomplete evidence
 - ▶ Superficial analysis of discount
 - ▶ Not enough math



pay periods x # class members x wages = \$\$\$\$;
% discount x \$\$\$\$ = fair settlement

Discounted for risks e.g.,

Not certifiable

Not manageable

Not provable

Defendant insolvent

Other recurring problems



Missing declarations

Missing documents

Release overbroad

Problems with notices

Solution: Model Agreements & Notices

1. PAGA &
Class Action

2. Class Action

3. PAGA



Models
Make *Plaintiff*
Responsible
for Preparing
Approvable
MPA

7.1 MPA to be filed within ___ days

7.2 that includes an analysis of the Settlement under *Dunk/Kullar* and

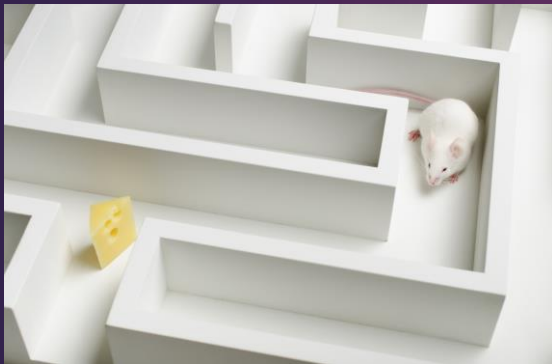
- proposed order
- draft notice to class
- Administrator's signed declaration with "not to exceed" bid
- Class Rep's signed declaration
- Class/PAGA counsel's signed declaration "no pending matters that will be extinguished ..."
- Redlined version of Model Agreement
- All facts re atty conflicts of interest with class members/cy pres

No "service award" for PAGA reps;
but okay to pay extra for general release

PAGA penalties
"shall be distributed"
75% to LWDA; 25% to
aggrieved
employees

No mention of
additional payment
to PAGA rep

Strategies for Mediation



- ▶ Give P necessary **data** for Dunk/Kullar analysis
- ▶ **Agree in principle** to model K
 - ▶ Saves \$ negotiating & wordsmithing
 - ▶ Likely to be approved
 - ▶ Agree to short deadline MPA filing (claim preclusion kicks in sooner)



SCOTUS weighs in on PAGA

Viking River Cruises



- ▶ Courts can't compel entire PAGA to arbitration (FAA can't preempt)
- ▶ But FAA requires arbitration of individual claims per terms of contract
- ▶ SCOTUS (?mis-)interprets CA law to require dismissal when court grants MTCA of individual claim
 - ▶ Contra to *Kim v. Reins*?

Viking's Class Action/PAGA Waiver

“There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding, including, without limitation, uncertified class actions (“Class Action Waiver”)”

Orders from over 75 trial courts: 90% state courts; 10% USDCs

- ▶ Roughly 10%) denied MTCAs based on language of contract, FAA N/A, delay
- ▶ Vast majority granted MTCA but stayed PAGA (retained jurisdiction) rejecting Part IV of the *Viking River* decision
- ▶ Roughly 12% granted and dismissed PAGA claim (mostly federal)

Kudos to Lauren Teukolsky, Teukolsky Law APC

Is *Viking* the End of the Story?

- ▶ Adolph v. III
Techn

o
an
pur

Review Granted!
7/20/22



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Mills v. Facility Solutions Group Inc.

84 Cal.App.5th 1035 (11/22)

- ▶ *Viking* held “the FAA preempted Iskanian’s ‘indivisibility rule,’ . . . because it effectively prevented the parties from agreeing to arbitrate an employee’s individual claims”
- ▶ “*Iskanian*’s holding that waivers of PAGA claims are unenforceable as against public policy remains good law following *Viking River*.”
- ▶ Contractual waivers of representative PAGA claims remain unenforceable under *Iskanian* as against public policy.
- ▶ Affirms trial court’s finding the representative waiver was unenforceable.

Possible Downside of “Individual” PAGA Arbitration – Mass Actions

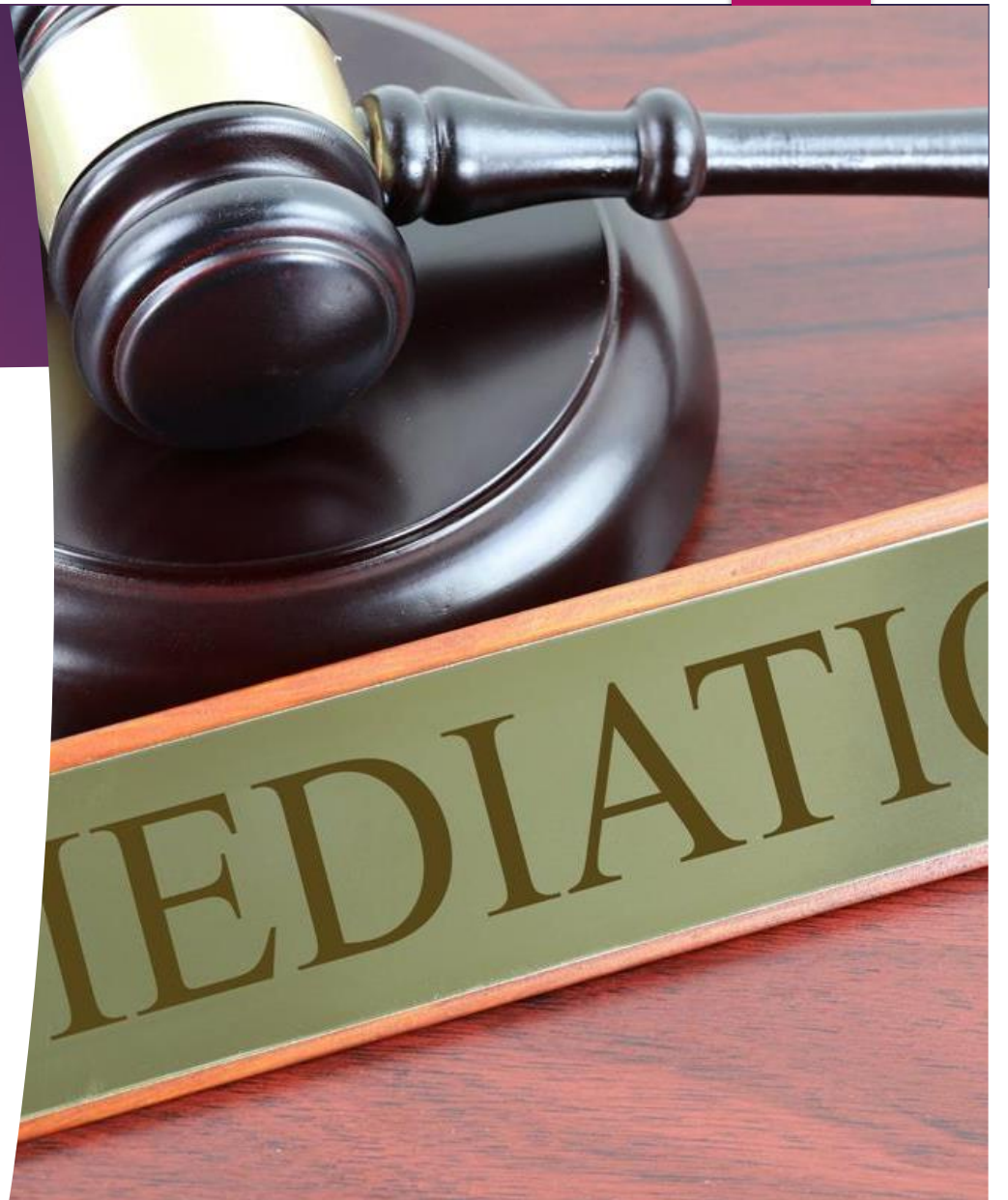


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Another Way to Manage PAGA Defense Costs

- ▶ Early mediation
 - ▶ Limits defense costs
 - ▶ Early peace/res judicata
 - ▶ But assumes Plaintiff has standing



Yet Another Way to Manage Defense Costs

- ▶ Hold out for a comprehensive bench trial
 - ▶ High penalties unlikely
 - ▶ May spur favorable last-minute settlement
 - ▶ Deters serial filings





The End of
Lawful
Rounding?

Camp v. Home Depo 10/24/22

- ▶ Reversed HD's SJ despite neutral rounding
- ▶ Per records, employees not paid for all time worked
- ▶ Now that time can be captured precisely, what's the benefit of rounding?
- ▶ Expressly questions See's Candy v. Sup. Ct.



Wesson v. Staples: Manageability



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Wesson: Court
Can Strike
Unmanageable
Claims

▶ PAGA makes no mention of
“manageability”

▶ “[P]roof that a policy is one
We seek to
on

v. Sup.Ct.

Review
Granted!

erent authority
that PAGA claims can
fairly and efficiently tried and,
if necessary, may strike claims
that cannot be rendered
manageably tried.” Wesson v.
Staples 68 Cal.App.5th 746 (2021)

