

California Private Attorneys General Act – A Look Back at 2022

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Thousands of cases are filed under California's Private Attorneys General Act (PAGA) each year and many of them made the headlines in 2022.

PAGA authorizes employees to file lawsuits to collect penalties for California Labor Code violations on behalf of the state's Labor and Workforce Development Agency (LWDA) and other aggrieved employees.

While PAGA claims often are compared to class actions, many of the rules and procedural protections governing class actions (such as the certification process) do not apply to PAGA actions.

U.S. Supreme Court – *Viking River Cruises, Inc. v. Moriana*, No. 20-1573

At the end of 2021, the U.S. Supreme Court granted review of an unpublished decision from the California Court of Appeal on whether the Federal Arbitration Act (FAA) requires enforcement of an arbitration agreement mandating that claims be brought on an individual basis only and not in a representative action, including an action under PAGA.

In June 2022, the U.S. Supreme Court issued its decision, holding the FAA does not require enforcement of a representative action waiver that categorically bars a party from bringing a representative claim or otherwise acting in a representative capacity – a “wholesale” representative action waiver. Therefore, an arbitration agreement with a representative action waiver, under the FAA, cannot preclude a plaintiff altogether from bringing a PAGA action and representing California's LWDA in the action.

The Court also held, however, that the FAA preempts California law to the extent California requires the plaintiff's PAGA claims to be adjudicated with the PAGA claims of the other alleged aggrieved employees. The Court reasoned that California's “non-divisibility” rule effectively amounted to a mandatory claim joinder rule, which conflicts with the FAA's mandate that arbitration is a matter of consent and parties to a bilateral arbitration agreement should arbitrate their disputes on a one-on-one basis as they agreed. The Court, therefore, concluded that the plaintiff's individual PAGA claims should be submitted to individual arbitration while the PAGA claims of the other alleged aggrieved employee should remain to be dismissed since the plaintiff – who must proceed to individual arbitration – lacks standing to prosecute the PAGA claims of the other alleged aggrieved employees in court.

The decision, while heralded by some as the end of PAGA, raised more questions about the status of PAGA and employment arbitration agreements. Justice Sonia Sotomayor's concurring opinion in *Viking River Cruises* seemingly included an invitation for California's legislature and courts to clarify standing issues related to PAGA actions when an employee is required to arbitrate their individual PAGA claims in accordance with an enforceable arbitration agreement. Without missing a beat, the California Supreme Court appears to

have accepted the invitation. The California Supreme Court agreed to review several cases on the issue, including *Wing v. Chico Healthcare & Wellness Centre* 78 Cal.App.5th 22 (Cal. Ct. App. 2022), and *Sanchez v. MC Painting* No. D078817 (Cal. Ct. App. Apr. 22, 2022). The specific question presented in these cases: Whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are premised on Labor Code violations sustained by the aggrieved employee maintains statutory standing to pursue PAGA claims arising out of events involving other employees in court or any other forum the parties agree is suitable.

The answer to this question means the difference between a manageable PAGA arbitration involving one individual and an expensive, costly PAGA action involving potentially thousands of individuals.

Key Court of Appeal Decisions

California's appellate courts also weighed in with decisions regarding PAGA in 2022, including:

- *Shaw v. The Superior Court of Contra Costa County* 78 Cal.App.5th 245: The California Court of Appeal for the First Appellate District held that the trial court did not err in applying exclusive concurrent jurisdiction to the overlapping PAGA claim. The opinion held that there was no evidence of legislative intent to alter the common law. The decision will assist employers managing overlapping PAGA matters by ensuring an initial case can proceed before a later-filed overlapping action.
- *California Business and Industrial Alliance v. Becerra*, 80 Cal.App.5th 734: The California Court of Appeal for the Fourth Appellate District ruled that PAGA does not unconstitutionally delegate executive branch enforcement powers to the public. A lobbying group of small and mid-sized businesses in California had filed an action seeking a judicial declaration that PAGA was unconstitutional and an injunction barring the state from continuing to implement and enforce PAGA. On appeal, the plaintiff argued PAGA violates California's separation of power doctrine by allowing private citizens to seek civil penalties on the state's behalf without the executive branch exercising sufficient discretion over the case. The Court of Appeal affirmed the trial court's ruling, finding PAGA constitutional, and the California Supreme Court denied review of the matter.
- *Howitson v. Evans Hotel*, 81 Cal.App.5th 475: The California Court of Appeal for the Fourth Appellate District held that a plaintiff who settles a putative class action lawsuit seeking damages and statutory penalties under the California Labor Code is not barred by claim preclusion from subsequently filing a separate lawsuit for civil penalties under PAGA based on the same alleged Labor Code violations. The Court of Appeal reasoned that claim preclusion does not apply because the parties are different in the lawsuits — the plaintiff and putative class are the parties in the putative class action, whereas the State of California is the real party in interest in the PAGA action. The Court of Appeal also reasoned that privity, a necessary component of claim preclusion, does not exist because the State of California does not have an interest in an employee's private class action lawsuit.
- *Meda v. Autozone, Inc.*, 81 Cal.App.5th 366: The California Court of Appeal for the Second Appellate District confronted a PAGA action that raised the question of what it means for an employer to "provide" suitable seating to employees in compliance with

the California wage orders. Although the Court of Appeal did not reach a conclusive position on the matter, it explained that determining whether an employer properly provides suitable seating is fact-intensive and requires analysis of the totality of circumstances, including the nature of the employee's work, the location of any seating, the practicality of additional seating in the workspace, and whether employees were informed that they could utilize available seating.

- *Peck v. Swift Transportation*, No. 20-55119: The U.S. Court of Appeals for the Ninth Circuit held that a plaintiff in one PAGA action does not have the right to object to a settlement reached by another plaintiff in a separate but overlapping PAGA action. The Ninth Circuit reasoned that the plaintiff could not object to the settlement in the separate PAGA action because the plaintiff was not a party to that action. This decision further separates PAGA actions from class actions, as class members have a right to object to or appeal a settlement that would otherwise cover their claims.

Look Forward – PAGA in 2023

In addition to *Wing* and *Sanchez* (mentioned above), the California Supreme Court is set to decide two other PAGA cases in 2023 that could significantly affect PAGA litigation.

First, in *Estrada v. Royalty Carpet Mills, Inc.*, 76 Cal.App.5th 685 (Cal. Ct. App. 2022), the California Supreme Court is set to decide whether trial courts have inherent authority to ensure that PAGA cases can be tried in a manageable way and strike or dismiss PAGA claims if they are not manageable. This is a critical question for employers, because ensuring PAGA claims can be tried in a manageable way protects an employer's due process rights and shields an employer from overbroad and unwieldy PAGA claims.

Second, in *Turrieta v. Lyft, Inc.*, 69 Cal.App.5th 955 (Cal. Ct. App. 2021), the California Supreme Court is set to decide whether a plaintiff in a PAGA action has the right to intervene, object to, or move to vacate a judgment in a related PAGA action that has been settled. This is the same issue decided by the Ninth Circuit in *Peck*. Eyes will be focused on whether the California Supreme Court will agree with the Ninth Circuit. The decision could affect how contentious (or not contentious) PAGA settlements are in the future. If plaintiffs are permitted to intervene or object to a settlement reached by other plaintiffs in other PAGA cases, a calamitous settlement process can ensue as plaintiffs fight each other to recover their own piece of the settlement pie.

Proposition to Reform PAGA

Finally, the Secretary of State announced in July 2022 that the proposition to reform PAGA, known as the California Fair Pay and Employer Accountability Act, qualified for the 2024 ballot with nearly 1 million signatures submitted in support of PAGA reform.

The proposition seeks to repeal PAGA and eliminate the Labor Commissioner's authority to contract with private organizations or attorneys to assist with enforcement actions. It proposes instead that the state provide more funding to the Labor Commissioner to enforce Labor Code violations.

If you have questions about PAGA, please contact the California Class and PAGA Action group or the Jackson Lewis attorney with whom you regularly work.

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