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The nature of PAGA actions

A PAGA PRIMER: THE CASES AND ISSUES YOU NEED TO KNOW

The seminal case in this area is the California Supreme Court's decision in *Iskanian v CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348. As the Court explained after examining the legislative history of the statute, PAGA was enacted for a dual purpose: (1) many Labor Code violations went unenforced because there was no civil penalty for those violations and the only punishment was criminal misdemeanors, and Labor Code violations were not a top priority for criminal prosecutors; and (2) even where civil penalties did exist in the code, "there was a shortage of government resources to pursue enforcement," and it was estimated that underground economy businesses were costing the state $3-$6 *billion* per year in annual tax revenue. (*Iskanian*, *supra*, 59 Cal.4th at 379.)

PAGA addressed the first issue by establishing civil penalties "significant enough to deter violations" of specific Labor Code violations. (*Ibid.*) By deputizing private citizens as attorneys general to prosecute and collect these newly created civil penalties, the Legislature, in effect, created a new legion of regulators to enforce the law and "to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." (*Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 980.)

As such, "[i]n a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies – namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor and Workforce Development Agency." (*Arias*, *supra*, 46 Cal.4th at 986.) Thus, when an employee files suit under PAGA, they do so "as the proxy or agent of the state's labor law enforcement agencies." (*Ibid.*) Put another way, "a PAGA claim is an enforcement action between the LWDA and the employer, with the PAGA plaintiff acting on behalf of the government." (*Kim v. Reins Int'l Calif., Inc.* (2020) 9 Cal.5th 73, 86.) Because a plaintiff-employee, in essence, stands in the government's shoes, a PAGA representative action is a form of a qui tam action, and the LWDA "is always the real party in interest in the suit." (*Iskanian*, *supra*, 59 Cal.4th at 382.)

However, a PAGA action categorically is *not* a class action, and therefore the requirements of Code of Civil Procedure section 382 do not apply to PAGA claims. (*Kim*, *supra*, 9 Cal.5th at 86; *Williams v. Super. Ct.* (2017) 3 Cal.5th 531, 558 [uniform policies may show commonality in class actions but are not required "for discovery, or even success, in a PAGA action."].) Class actions are a procedural device to aggregate claims of individual damages of a large number of people for whom it would be impracticable to bring their individual claims to court all at the same time. PAGA representative actions, by contrast, are a means of collecting the government's penalties for the Labor Code violations an employer has committed.

In other words, class actions assess how much harm each individual class member has suffered, whereas PAGA actions examine the number of violations the company has committed. For example, in a wage-and-hour class action where it is alleged the employer did not provide all required meal periods (§ 512, subd. (a)), one must determine which employees were not provided meal periods, how many days during the relevant timeframe the meals were not provided, what those employees' regular hourly rates of pay were, and then calculate how much the employees are owed in premium wages (one hour's regular rate of pay for each day in which at least one compliant meal period was not provided). (§ 226.7, subd. (c).) By contrast, in a PAGA action, you would simply calculate a $50 penalty per employee per pay period for the number of employees who were not provided proper meal breaks each pay period. (§ 558, subd. (a)(1).)

Unlike a class-action representative, a PAGA representative *need not have personally suffered* all the violations alleged in the PAGA claim to have standing to bring the PAGA action and need not show proof of any such harm. (*Williams*, *supra*, 3 Cal.5th at 546; *Kim*, *supra*, 9 Cal.5th at 85; *Huff v Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal.App.5th 745, 751 ["[W]e conclude that PAGA allows an 'aggrieved employee' – a person affected by at least one Labor Code violation committed by an employer – to pursue penalties for all the Labor Code violations committed by that employer."].) After all, the LWDA would not have personally suffered *any* of the Labor Code violations, yet it would be able to impose penalties on *all* violations after an investigation. An employee may even initiate a PAGA action in court, settle and dismiss their individual wage claims in arbitration, and continue to prosecute the PAGA claim in court. (*Kim*, *supra*, 9 Cal.5th at 84 ["The Legislature defined PAGA standing in terms of violations, not injury."].) The focus is on the employer's conduct, not the individual harm to the employees.

The PAGA statute

The term "aggrieved employee" is a term of art found directly in the statute. (§ 2699, subd. (c).) It defines not only who may have standing to bring a PAGA claim (someone who has suffered at least one Labor Code violation) but also "who may recover a share of the penalties and how those penalties are calculated." (*Kim*, *supra*, 9 Cal.5th at 87.) Although the state has an interest in all civil penalties collected in a PAGA action, 75% of the penalties go to the state and 25% of the penalties are distributed evenly among all aggrieved employees, i.e., "any person… against whom one or more of the alleged violations was committed." (§ 2699, subd. (c), (i) [The statute also provides that prevailing employees are entitled to recover reasonable fees and costs. (§ 2699, subd. (g)(1))].) Thus, there is no such thing as a PAGA action on behalf of one plaintiff, or a situation in which the entire 25% of the civil penalties collected goes to the representative plaintiff. (*Moorer v. Noble L.A. Events, Inc.* (2019) 32

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Cal.App.5th 736, 738, 742-743; *Iskanian*, *supra*, 59 Cal.4th at 381 ["[A]n action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'(Citation.)]".)

Certain code sections have specific civil penalties which predate PAGA and which historically only the Labor Commissioner could enforce and collect. (See, e.g., §§ 558 [overtime and meal periods] and 226.3 [failure to provide all required information on wage statements].) Others were added concurrently with PAGA (or shortly thereafter) to create civil penalties where only misdemeanors had previously existed. (See, e.g., §§ 98.6 [whistleblower retaliation for making a wage complaint] and 226.8 [willful misclassification of employees as independent contractors].) But many Labor Code sections do not have a specific civil penalty that correlates directly with an infraction of that section, and they are enumerated in section 2699.5. For those code sections, the default penalty is found in section 2699, subd. (f): $100 per employee per pay period for an initial violation and $200 per employee per pay period for each subsequent violation.

Calculating penalties

Most civil penalties available under PAGA have different amounts for an "initial violation" and a "subsequent violation." What does that refer to? Many practitioners will argue it automatically means the lower amount (e.g., $100) per employee for the first eligible pay period, which constitutes the initial "violation," and the higher amount (e.g., $200) per employee for each subsequent pay period, which would be "subsequent violations." Not so fast. According to the DLSE interpretations manual, until an employer has been notified that it is violating the Labor Code, each violation is a "violation" subject to penalties – i.e., an "initial" violation. (*Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209.) However, once the employer receives the LWDA letter, it is put "on notice that any future violations will be punished just the same as violations that are willful or intentional," meaning at the *double* rate charged for subsequent violations. (*Ibid.*)

Notice requirements

To initiate a PAGA action, an aggrieved employee must give written notice to the LWDA by filing a letter online and sending the same letter to the employer via certified mail setting forth the Labor Code sections alleged to have been violated and the facts and theories supporting each alleged violation. (§ 2699, subd. (a)(1); *Noori v. Countrywide Payroll* (2019) 43 Cal.App.5th 957, 971-972.)

The PAGA notice may not be "a string of legal conclusions that parrot[] the allegedly violated Labor Code"; there must be enough information to allow the LWDA to determine whether to allocate scarce resources to an investigation and to allow the employer the opportunity to cure (at least some of) the violations or prepare a response. (*Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 837-838.) Nevertheless, "[N]othing in section 2699.3 suggest[s] that factual allegations in PAGA notices must exceed those normally found sufficient in complaints" or "must satisfy a particular threshold of weightiness." (*Rojas-Cifuentes v. Super. Ct.* (2020) 58 Cal.App.5th 1051, 1060.) And, while the representative plaintiff need not have personally suffered each of the violations alleged in the LWDA letter, to provide proper notice the PAGA letter must at least allege that other aggrieved employees have suffered the violations. (*Khan v. Dunn-Edwards Corp* (2018) 19 Cal.App.5th 804, 809.)

The LWDA must notify the employer and the representative plaintiff by certified mail within 60 calendar days of the filing of the PAGA notice that the agency does *not* intend to investigate the matter; if no notice from the agency of its intent to investigate is provided at all (and it rarely is) for 65 days, then the employee may commence a civil action for the Labor Code violations – and against the employer(s) identified – in the PAGA notice. (§ 2699.3, subd. (a)(2).) This is the administrative requirement a PAGA representative plaintiff is required to exhaust timely before filing a civil action for PAGA penalties. The civil action must be filed within one year of the last date of the violation(s) alleged in the notice. (Code Civ. Proc., § 340, subd. (a) [an action based upon a statutory penalty has a statute of limitations of one year].) The PAGA notice periods toll the statute of limitations for a civil action. (§ 2699.3, subd. (d).)

Relation-back doctrine

Occasionally, a new legal theory develops during litigation that you want to add to the complaint, but you do not come to that realization until well beyond the one-year limitations period. If the new allegation is based on facts previously alleged in the original PAGA notice, you may relate the new claim back to the original notice under the relation back doctrine and the new theory will be considered timely. (*Amaral*, *supra*, 163 Cal.App.4th at 1199-1200.) The amended complaint must "'(1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality.' [Citation.]" (*Brown*, *supra*, 28 Cal.App.5th at 841.) It may not be used "to frustrate the intent of the Legislature." (*Ibid.*)

In *Brown*, the plaintiff filed a PAGA notice in 2009 and another in 2016. On their own, the later-added Labor Code violations from 2016 would have been time-barred, but the Court of Appeal remanded the matter for the trial court to determine whether any of the new Labor Code sections allegedly violated related back to the "adequately noticed and alleged" section 226 claim from the 2009 filing. (*Id.* at 842.) A later case found, "The clear import of *Brown*'s holding is that an untimely PAGA claim may relate back to an earlier complaint only if the complaint was preceded by timely notice to the LWDA." (*Esparza v. Safeway* (2019) 36 Cal.App.5th 42, 62.)

The key consideration, from the Legislative history, appears to be the due process concern of providing adequate

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notice to the LWDA and the employer, to "allow[] the [LWDA] to act first on more 'serious' violations such as wage and hour violations and [to] give employers an opportunity to cure less serious violations." (*Caliber Bodyworks, Inc. v. Super. Ct.* (2005) 134 Cal.App.4th 365, 375.) If a later-filed PAGA notice frustrates these purposes, it will not relate back to the original filing.

Civil actions and resolution

Typically, PAGA claims are filed in one of three ways: (1) as a separate, stand-alone action in which the PAGA claim is the only cause of action ("PAGA- only action"), albeit with multiple parts representing each of the Labor Code violations; (2) as an add-on cause of action to a wage and hour class action; or (3) as an add-on cause of action to the claims of an individual plaintiff, some of which may be for Labor Code violations (e.g., discrimination against parents of school-aged children, § 230.8), others may not (e.g., discrimination or harassment claims under the Fair Employment and Housing Act). (See *Rojas-Cifuentes*, *supra*, 58 Cal.App.5th at 1061 ["We agree Rojas's PAGA claim can be regarded as multiple causes of action for purposes of summary adjudication"].)

A PAGA plaintiff must upload the civil complaint containing the PAGA claim to the LWDA website within ten days of filing the complaint in court. (§ 2699(*l*)(1).)

Discoverable information in PAGA actions, as in class actions, includes contact information for all aggrieved employees because they are all potential percipient witnesses to the Labor Code violations and their potential testimony enforces California's public policy. (*Williams*, *supra*, 3 Cal.5th at 547-548.)

PAGA claims generally are filed as PAGA-only actions where there are enforceable arbitration agreements, as PAGA claims may not be compelled to arbitration (see below). In those actions, the PAGA component is the entire measure of the value of the action. PAGA claims that are filed as causes of action within class actions are subsumed within the class action settlement and therefore are a lesser part of the settlement, with 75% of the portion of the gross settlement amount allocated to PAGA civil penalties paid to the LWDA and 25% of the PAGA portion rolled into the individual settlement payments for each class member.

PAGA claims may also be filed in conjunction with individual complaints, which may or may not be based on Labor Code violations. (For example, Lab. Code, § 1102.5, subd. (f) provides for a civil penalty of $10,000 per violation, and plaintiff practitioners for years have struggled to decide whether to initiate a PAGA action to recover this penalty and attorney's fees; however, effective January 2021 the Legislature amended § 1102.5 to include attorney's fees for a prevailing plaintiff – subd. (j) – so likely this type of PAGA claim will start to disappear.)

Because there is no numerosity requirement for a PAGA action, *any* business with any number of employees could be violating the Labor Code, so sometimes a PAGA action is merited for smaller employers. However, only bring the PAGA action on behalf of the state if it will serve a public good (i.e., will improve the work environment for multiple employees beyond your client). Do not use the threat of PAGA to try to leverage a better settlement on behalf of your client's damages and then pay little to nothing to the state; that reinforces the false narrative that greedy trial lawyers are driving PAGA lawsuits. Also, keep in mind that most insurance policies do not cover wage and hour actions, so the money paid toward the PAGA settlement will come directly from the business itself, a consideration with smaller employers.

Most PAGA cases settle – PAGA trials are rare. All PAGA settlements must be reviewed and approved by the trial court. (§ 2699, subd. (l)(2).) The proposed settlement must be uploaded to the LWDA at the time it is submitted to the court for review and approval. (*Ibid.*) The court has discretion to award an amount less than the maximum penalty amounts "if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (§ 2699, subd. (e)(2).) Thus, while there is no requirement (like in class actions) that a court make a finding that the PAGA settlement is fair to the absent aggrieved employees, the court does have the discretion to approve a settlement of far less than 100% of the penalties (because the intent is not to put companies out of business for violating the Labor Code). Courts must balance the fairness to the state's interests against any potential unfairness to the employer.

Reverse auctions

In recent years, a practice known as "reverse auctions" has become disturbingly and increasingly commonplace. A reverse auction occurs when multiple plaintiffs file PAGA actions (or class or collective actions) against the same defendant, and the company or its counsel identifies what it perceives to be the most receptive plaintiff's counsel and settles the action for the lowest price possible. Because a PAGA judgment is binding on *all* aggrieved employees, as well as the government, one case settling with court approval instantly eviscerates all other PAGA cases currently filed against that company. (*Arias*, *supra*, 46 Cal.4th at 986.) Imagine you have been litigating a PAGA action for years, investing heavily in time and money, and someone later files against the same company and settles quickly for a fraction of what you have valued the case to be worth. The state and the workers are cheated out of a fair value for the Labor Code violations, and you are stuck "holding the bag."

The California Employment Lawyers Association has developed a Reverse Auctions Policy, with proposed guidelines for attorney conduct. I encourage you to download it from the CELA website and review it carefully.

One clear way plaintiff practitioners might avoid this trap is to check the LWDA's PAGA case search database before

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filing any PAGA notice or civil complaint to see if any other aggrieved employee has filed a PAGA notice against the same company, and if so, how recently: https://cadir.secure.force.com/PagaSearch/PAGASearch. Sometimes, it is not apparent from the filings that two employees are suing the same employer for Labor Code violations because each employee (based on their paystubs) has named a different entity in the PAGA notice – or if multiple entities are listed on the notice, only the first name is listed in the database. Determining whether notices have been filed against the same company is an inexact science. If you discover that another firm has already filed, reach out to seek to cooperate or collaborate, to the extent possible; other times, it may be more appropriate to not file a PAGA notice and instead focus on vindicating your client's individual claims.

Combatting reverse auctions also will require the cooperation of defendants to identify, and notify courts, of related cases. It also will require mediators to ask *before* engaging in settlement negotiations – and courts reviewing PAGA settlements to ask before granting approval – whether there are any related cases. Ultimately, reverse auctions violate the fundamental public policy underlying PAGA, and all parties involved share a responsibility to ensure that actions prosecuted on behalf of the state are safeguarded and carried out in a responsible manner.

PAGA waivers and arbitration agreements

A predispute waiver of PAGA rights is unenforceable because an aggrieved employee may not waive their right to bring a PAGA action. (*Iskanian*, *supra*, 59 Cal.4th at 383.) This rule does not frustrate the purpose of the Federal Arbitration Act ("FAA"), because the FAA's goal is "to ensure an efficient forum for the resolution of *private* disputes," whereas a PAGA action is a dispute between the *state* and the employer. (*Id.* at 384, original emphasis.) Moreover, a PAGA claim is outside of the FAA's protections because it does not arise out of a contractual relationship between the state and the employer. (*Id.* at 386.)

The *Iskanian* court took great care in responding directly to the still relatively recent decision from the United States Supreme Court, *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333. There, Justice Scalia lambasted the California high court's holding in *Discover Bank v. Super. Ct.* (2005) 36 Cal.4th 148, that class arbitration waivers in consumer contracts were unconscionable, finding the "*Discover Bank* rule" to be hostile to the FAA and to arbitrations generally.

Seven years after *Concepcion*, the U.S. Supreme Court issued another landmark arbitration ruling in *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, in which the highest court held class action waivers in the employment context were enforceable and did not violate the National Labor Relations Act's worker protection of the right to concerted activity. Immediately, employers filed appeals of PAGA actions contending *Iskanian* was no longer good law and PAGA waivers were enforceable. That argument has been roundly rejected, and courts have affirmed they remain bound by *Iskanian* because *Epic Systems* did not address a claim by the government for civil penalties or whether a waiver of bringing a PAGA action in any forum could be enforced. (*Correia v. NB Baker Elec., Inc.* (2019) 32 Cal.App.5th 602, 608-609; *Olson v. Lyft, Inc.* (2020) 56 Cal.App.4th 862, 871; *Juarez v. Wash Depot Holdings, Inc.* (2018) 24 Cal.App.5th 1197, 1202-1203 [PAGA waiver unenforceable as against public policy and unseverable from the employee handbook].)

Further, many courts since *Iskanian* have held that PAGA claims cannot be compelled to arbitration. (See, e.g., *Correia*, *supra*, 32 Cal.App.5th at 622 [reasoning that the state retains possession of the underlying right to the PAGA claim until it has given the employee explicit or implicit authority to bring the claim].) Absent the state's consent, a predispute arbitration agreement between an employee and an employer cannot be enforced against the state since it was not a party to the contract, nor did it stand in privity. (*Ibid.*)

Concurrently prosecuting PAGA and arbitration claims

Courts frequently stay PAGA claims while individual wage claims are litigated in arbitration. But they should not.

First, the State's claims are independent of the aggrieved employee's individual harm, and the state should not have to wait to vindicate its claims. In fact, it does not have to wait, as the statute itself provides, "Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." (§ 2699, subd. (g)(1); *Kim*, *supra*, 9 Cal.5th at 88 ["Standing for these PAGA-only cases cannot be dependent on the maintenance of an individual claim because individual relief has not been sought."].)

Second, "Because a PAGA claim is representative and does not belong to an employee individually, an employer should not be able [to] dictate how and where the representative action proceeds." (*Jarboe v. Hanlees Auto Grp.* (2020) 53 Cal.App.5th 539, 557.)

Third, employers like to argue in favor of a stay because of the danger of potentially inconsistent rulings where the PAGA and individual claims arise out of the same nucleus of facts. However, "Because an action under [PAGA] is designed to protect the public, and the potential impact on remedies other than civil penalties [(i.e., individual damages)] is ancillary to the action's primary objective, the one-way operation of collateral estoppel in this limited situation does not violate the employer's right to due process of law." (*Arias*, *supra*, 46 Cal.4th at 987.) Thus, nothing that the trial court decides should violate the employer's rights in arbitration.

What about issue preclusion in the other direction – the possible influence on the PAGA action by an arbitrator's ruling? Here, too, there is long-standing

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authority from the California Supreme Court: "[A] private arbitration award, even if judicially confirmed, can have no collateral estoppel effect in favor of third persons unless the arbitral parties agreed, in the particular case, that such a consequence should apply." (*Vandenberg v. Super. Ct.* (1999) 21 Cal.4th 815, 834.) Thus, the PAGA action should be litigated and tried on its own merits, if the court has already determined that the PAGA representative is an "aggrieved employee;" such a decision may not be made by an arbitrator. (*Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 995; *Contreras v. Super. Ct.* (2021) 2021 WL 776560, at *1 ["the delegation of ['who is an aggrieved employee' to an arbitrator] frustrates PAGA's purpose and is therefore prohibited under California law"].)

Other considerations

California courts have addressed several other PAGA-related issues since *Iskanian*. For example, in 2019 the California Supreme Court resolved an issue that had been percolating at the appellate level, holding that the "victim specific" damages portions of Labor Code sections 558 and 1197.1 (the unpaid wage amounts "in addition to" the civil penalty) could only be collected by the Labor Commissioner and not by aggrieved employees, and therefore no part of the PAGA claim, including the individual claim, could be compelled to arbitration. (*ZB, N.A. v. Super. Ct.* (2019) 8 Cal.5th 175, 182.)

This holding squared with the decision in *Zakaryan v. The Men's Warehouse, Inc.* (2019) 33 Cal.App.5th 659 (disapproved on other grounds by *ZB, N.A.*, *supra*, 8 Cal.5th at 196, fn.8) that splitting a PAGA claim into two components "runs afoul of the primary rights doctrine because it impermissibly divides a single primary right," since there is only one injury in a PAGA action, namely the injury to the public caused by the employer's Labor Code violations. (*Id.* at 671-672.)

Aggrieved employees may now bring PAGA actions against public entities, but only PAGA claims that are based on Labor Code provisions that specifically provide for a civil penalty, not those based on the default penalty in Section 2699(f). (*Sargent v Bd of Trustees of Calif. State Univ.* (March 5, 2021) _ Cal.Rptr.3d_2021 WL 836135, at *6-*8 [This issue was discussed in this magazine two years ago by the prevailing attorneys in *Sargent*, Scott Tillett, V. Joshua Socks, and Dustin Collier – kudos to them!].)

The U.S. Court of Appeals for the Ninth Circuit has also weighed in that PAGA penalties may not be used to satisfy the $5 million amount in controversy requirement for the Class Action Fairness Act of 2005 ("CAFA"), acknowledging that a stand-alone PAGA action is the type of lawsuit that could not be filed under FRCP Rule 23 or its state corollary (Code Civ. Proc., § 382) and therefore CAFA should not apply and a district court would not have jurisdiction over the matter. (*Canela v Costco Wholesale Corp.* (9th Cir. 2020) 971 F.3d 845, 856.)

Conclusion

In recent years, there has been a great push by the business community to defeat PAGA. Each year, numerous bills are introduced in the Legislature designed to limit or eliminate the statute. Why? Because in a world where workplace class action waivers are increasingly commonplace, and the U.S. Supreme Court elevates arbitration over any type of concerted activity, PAGA remains the last hope for California's employees to hold businesses accountable for exploiting their workforce, and the business community knows this. Fortunately, so does the California Supreme Court, which, since *Iskanian*, has gone to great lengths to ensure that PAGA does not implicate the FAA and somehow wind up in front of SCOTUS.

As practitioners, we are tasked with safeguarding this worker protection program the Legislature has instituted and must not abuse it. Further, as shown above, there are multiple complex and nuanced issues involving PAGA claims, and case law on PAGA is constantly evolving, so if you believe you may have reason to bring a PAGA claim you would be well-advised to consult with, if not co-counsel with, an attorney who is well-versed in this area. Together, we can make a positive difference in the lives of millions of employees.

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