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Recent developments in ADR under the "new" PAGA

SB 92 AND AB 2288 BROUGHT SIGNIFICANT REFORMS TO PAGA BUT CREATED NEW ISSUES

The Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.; "PAGA") was enacted by the California Legislature to maximize compliance with state labor laws in light of inadequate funding and declining staffing at state labor law enforcement agencies. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980.) PAGA authorizes an aggrieved employee to seek to recover civil penalties for Labor Code violations from employers on behalf of current and former employees. PAGA essentially authorizes private citizens to act as a "private attorney general" on behalf of the California Labor and Workforce Development Agency (LWDA). (*Arias, supra*, at 980.)

As more and more employers imposed arbitration with class-action waivers on employees as a condition of employment, many plaintiffs turned to PAGA claims as an alternative and effective means of bringing representative actions for Labor Code violations. After a proposition largely repealing PAGA qualified for the November 2024 state ballot, the state legislature, business, and labor groups reached a compromise deal to reform PAGA and withdraw the ballot measure to repeal PAGA.

Recent case law and the 2024 amendments to PAGA have created new issues that may arise in mediation and arbitration of PAGA cases.

PAGA-reform legislation

On July 1, 2024, Governor Gavin Newsom signed two bills, Senate Bill 92 and Assembly Bill 2288, into law, which brought significant reforms to PAGA. The reform amendments to PAGA, or "new" PAGA, apply to claims where the PAGA notice was sent to the LWDA and the employer on or after June 19, 2024.

The amendments include important changes to PAGA, such as (1) stricter standing requirements; (2) early evaluation and cure options; (3) a change in the allocation of penalties to 35% to aggrieved employees and 65% to the state (from 25% and 75%, respectively); (4) reduced penalties for wage statement violations; (5) penalty caps for employer's good-faith compliance; and (6) manageability limitations. The amendments did not directly make any changes to the attorney's fees provisions in PAGA.

Under the amendments to PAGA, the Legislature expanded the opportunities for employers to avoid costly litigation by creating procedures that allowed employers to reduce penalties. The amendments seek to encourage the early resolution of PAGA claims.

Expanded cure options

After October 1, 2024, the amendment's cure provisions went into effect. Thereafter, employers with fewer than 100 employees have expanded options to cure certain alleged Labor Code violations upon receiving a PAGA notice. In particular, employers can now cure commonly brought claims for minimum wage, overtime, meal/rest breaks, and necessary expense reimbursement. (Lab. Code, § 2699.3, subd. (c)(2)(A).) Employers

of any size may seek to cure wage-statement violations. (Lab. Code, § 2699.3, subd. (c)(3).)

These employers may submit proposals to the LWDA to cure violations within 33 days of the PAGA notice. The LWDA will determine if the proposed cures are adequate. Curing a violation requires correcting the alleged violation, compliance with the statute alleged to have been violated, making each aggrieved employee whole, repaying owed wages to the aggrieved employees going back three years from the PAGA notice, paying 7% interest, any liquidated damages required by statute, and reasonable attorney fees and costs. For wage-statement violations, the employer must also provide fully compliant wage statements to the aggrieved employees for each pay period going back three years from the PAGA notice. (Lab. Code, §§ 2699(d)(1) and 2699.3(c)(2) and (3).)

There are a lot of logistical barriers and costs associated with attempting to cure alleged violations and a short time to do so. Further, in some cases, alleged violations may not be subject to the cure process.

Early case-evaluation process

After the PAGA lawsuit is filed, employers may request an early evaluation conference at the initial appearance and a stay of the court proceeding. The court appoints a neutral evaluator, and the employer submits a confidential statement explaining which alleged Labor Code violations it disputes and which, if any,

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2025

it intends to cure. The plaintiff must also submit a confidential statement explaining the basis for the alleged violations, the amount of penalties claimed, the basis for accepting or rejecting the employer's cure proposals, and a settlement demand.

Early-evaluation conferences are to be conducted by a judge, commissioner, or someone knowledgeable and experienced with issues arising under the code. The court designates the neutral evaluator. (Lab. Code, § 2699.3, subd. (f)(1).)

The neutral evaluator conducts a confidential conference to consider the positions. If the neutral evaluator accepts the employer's cure proposal and the employer follows through with the cure, the recoverable potential PAGA penalties are substantially reduced. This process is intended to focus on an early resolution of PAGA claims.

Unfortunately, the Legislature has not provided a clear path for the early evaluation-conference process. In many courthouses, the courts do not know what to do with the request for an early-evaluation conference. There is also not yet a resource of experienced and knowledgeable neutral evaluators available and willing to accept such appointments.

This process can be complicated and time-consuming, with no guarantee that it will resolve all or any of the alleged PAGA claims. Again, in most cases, a mediation is more likely to reach a reasonable resolution quickly.

Penalty caps for good-faith compliance

PAGA penalties are capped at 15% for employers who can show that before receiving a PAGA notice or request for employment records from the plaintiff, the employer took "all reasonable steps" toward complying with the Labor Code provisions in the PAGA notice. "All reasonable steps" include conducting periodic audits, taking action in response to the audit results, disseminating compliant written wage-and-hour policies, training supervisors on wage-and-hour compliance, and taking appropriate corrective action with regard to supervisors. (Lab. Code, § 2699, subd. (g).)

PAGA penalties are capped at 30% if the employer demonstrates that, within 60 days of receiving a PAGA notice, it took all reasonable steps toward complying with the Labor Code provisions identified in the PAGA notice.

In some, if not most cases, the parties will undoubtedly dispute whether the employer's efforts satisfied the "all reasonable steps" standard. Thus, this approach is not guaranteed to result in a streamlined process. It is another aspect of the dispute that is more amenable to resolution through mediation.

No right of intervention

In *Turrieta v. Lyft, Inc*. (2024) 16 Cal.5th 664, the California Supreme Court held that a PAGA plaintiff does not have a right to intervene in the ongoing action of another plaintiff asserting overlapping claims, object to a proposed settlement, or move to vacate a judgment in that action. Although not required, the Court did state that trial courts have the discretion to consider objections to a proposed settlement by nonparties.

The impact of the *Turrieta* decision creates situations where there is a race to a settlement or judgment in PAGA cases. Some plaintiffs might now be more likely to seek consolidation or coordination in cases with overlapping PAGA claims.

LWDA is taking a more active role

Before an allegedly aggrieved employee can commence a PAGA lawsuit, the employee must first send a notice to the LWDA and the employer of the specific Labor Code provisions alleged to have been violated, along with the facts and theories to support the allegations (the "PAGA notice"). This is an administrative-exhaustion requirement.

Until recently, it has been the experience of most PAGA practitioners that the LWDA was passive with respect to the LWDA notice process. Indeed, most practitioners considered the process for submitting a PAGA notice to the LWDA to be akin to submitting a complaint to the California Civil Rights Department (formerly the DFEH) and requesting an immediate right to sue, in that this administrative-exhaustion step was treated as a mere formality. This was so because the LWDA rarely took over the case or interfered.

The LWDA has begun to take a more active role in reviewing LWDA notices for basic compliance. It is starting to crack down on plaintiffs' law firms who submit boilerplate LWDA notices. The LWDA is sending letters to plaintiffs' law firms where the PAGA notices appeared to be in a template format and failed to demonstrate any applicability to the particular claimant or the circumstances of their specific employment. In at least one case, the LWDA sent a letter to a law firm directing it to amend over 100 PAGA notices. They set forth the specific violations each claimant suffered with the facts and theories supporting the alleged violations.

Effectively mediating PAGA cases

In many cases, especially where the alleged violations are disputed, it will often be less expensive and less onerous to resolve the PAGA case through early mediation with a knowledgeable and experienced PAGA mediator, than to go through the new PAGA cure process. There is no guarantee that the offered cures will even be accepted by the LWDA, or approved on appeal to the Superior Court. As noted above, the cure process can be costly. Whereas, often, in an early settlement, the resolution may not include all interest, liquidated damages, or the full three years of owed wages. Similarly, the early evaluation conference process is complicated and not guaranteed to resolve all, or even any, of the PAGA claims.

In most cases, an early resolution through mediation will often be preferable. Indeed, the statute expressly allows for private mediation.

There are some helpful steps to assist the parties in having the best chance to

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2025

mediate a PAGA case effectively. It is important to understand the strengths and weaknesses of the alleged violations. For example, are there time records establishing violations, or will the case be dependent on verbal testimony?

Next, it is often helpful to exchange damages calculations before mediation. At the very least, it is beneficial to share key assumptions in the damages calculations, such as the number of total PAGA pay periods, the number of alleged aggrieved employees, and the estimated violation rates for the various claims. This helps to ensure the parties start the analysis and settlement discussion from the same basic framework.

It is also important to remember that the court must approve a settlement reached in a PAGA case. The trial court is tasked with ensuring the settlement is fair, reasonable, and adequate in view of PAGA's goals to remediate labor law violations.

Arbitration of "headless" PAGA cases

The California Supreme Court ruled in *Adolph v. Uber Technologies, Inc*. (2023) 14 Cal.5th 1104, that a plaintiff whose individual PAGA claims are compelled to arbitration does not lose their standing to litigate their representative PAGA claims in court. Thereafter, trial courts have regularly compelled plaintiffs to arbitrate their individual PAGA claims first while staying the representative claims until after completion of the arbitration.

One of the more recent strategies plaintiffs' attorneys have used to try to avoid being compelled to court on the plaintiffs' individual claims was to bring so-called "headless" PAGA claims. A headless PAGA claim is one in which the plaintiff claims to bring a PAGA claim on a representative, non-individual basis and seeks only non-individual PAGA penalties. As a result, the plaintiff argues that they are not subject to arbitration of their individual PAGA claims before proceeding on the representative action in court.

In *Balderas v. Fresh Start Harvesting, Inc.* (2024) 101 Cal.App.5th 533, 538-539, the Second District Court of Appeal held that an employee who does not bring an individual claim against her employer still has standing to bring a representative PAGA claim action for herself and others. This case supported the argument for pursuing headless PAGA claims.

On December 30, 2024, the Second District Court of Appeal in *Leeper v. Shipt, Inc.* (2024) 107 Cal.App.5th 1001, 1008, held that every PAGA action necessarily includes an individual PAGA claim, rejecting the headless PAGA action. In *Leeper*, the plaintiff alleged a single count for a non-individual PAGA claim brought on a representative basis. The *Leeper* court interpreted Labor Code section 2699, subdivision (a) to mean that an action under PAGA has both an individual and a representative component. The *Leeper* court distinguished the decision in *Balderas*, finding that *Balderas* did not discuss nor decide whether a plaintiff may carve out an individual PAGA claim from a PAGA action.

Subsequently, the Fourth District Court of Appeal decided *Rodriguez v. Packers Sanitation Services LTD., LLC*, (2025) 109 Cal.App.5th 69, in which the court affirmed the denial of the employer's motion to compel arbitration of a headless PAGA claim. The court found that the plaintiff had not alleged an individual PAGA claim, but rather only alleged he was bringing the claim in a representative capacity. The court reasoned that based on the allegations of the complaint, there was no individual component to compel arbitration. The court expressly did not decide whether it is permissible for a plaintiff to file a headless PAGA complaint, suggesting that this could be challenged at the pleading stage.

Although none of the parties sought further review, on April 16, 2025, the California Supreme Court, on its own motion, ordered review of the *Leeper* decision to resolve this issue. The Court also ruled that the *Leeper* appellate decision may continue to be cited for persuasive value, leaving open the possibility of headless PAGA claims for the time being. Shortly thereafter, the Court also granted review of the *Rodriguez v. Packers* case, pending a determination in *Leeper*.

There will likely continue to be new decisions addressing headless PAGA claims until the Supreme Court resolves the issue. In fact, just days after the Court ordered review of *Leeper*, the Second District Court of Appeal decided *Williams v. Alacrity Solutions Group, LLC* (2025) 110 Cal.App.5th 932.

In *Williams*, the trial court dismissed a lawsuit as untimely where the PAGA notice and lawsuit were filed more than one year after the plaintiff's employment ended. The *Williams* court, following the reasoning of *Leeper* in part, noted that the statutory language mandates the inclusion of an individual PAGA claim. Thus, the individual plaintiff's claims must be timely within the one-year PAGA limitations period. The *Williams* court also discussed that the legislative intent to expeditiously address workplace violations would be thwarted if a plaintiff could bring a PAGA claim 10, 20, or 30 years after leaving their employer.

Due to the uncertainty regarding headless PAGA claims, courts may start staying cases until the California Supreme Court resolves the issue.

Issue preclusion can bar PAGA plaintiff from pursuing a representative claim

Generally, issue preclusion prevents re-litigation of issues argued and decided in prior proceedings where the party against whom preclusion is sought is the same party, or is in privity with the party, to the former proceeding. (*Rocha v. U-Haul Co. of California* (2023) 88 Cal.App.5th 65, 78.)

In *Rodriguez v. Lawrence Equipment, Inc.* (2024) 106 Cal.App.5th 645, the Second District Court of Appeal followed *Rocha* (which held that issue preclusion could apply to a PAGA plaintiff) and rejected *Gavriiloglou v. Prime Healthcare Management, Inc.* (2022) 83 Cal.App.5th 595 (which held that issue preclusion did

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2025

not bar the plaintiff's representative PAGA action despite an arbitrator's finding that the plaintiff had not suffered any Labor Code violations). The *Rodriguez* court held that where an arbitrator concludes that a PAGA plaintiff failed to establish they suffered any violation under the Labor Code, issue preclusion applies to bar the plaintiff from re-litigating those same alleged violations for the purpose of standing under PAGA. Since the arbitrator found that the plaintiff did not suffer any Labor Code violation, the plaintiff did not have standing as a representative plaintiff.

Conclusion

There are many benefits of seeking to resolve PAGA cases through mediation. It will often be a cost-effective, quick, and mutually beneficial option, typically resulting in a more favorable result for all parties involved. Resolving a PAGA case through mediation can avoid the additional costs and uncertainties in litigating PAGA cases, including the arbitration of the individual claims and then the litigation in court of the representative claims. In addition to the uncertainties inherent in all litigation, the constantly evolving legal landscape for PAGA claims, including how they proceed in arbitration, creates further uncertainties, which should make resolution a favorable alternative.

Attorney Barry M. Appell is a full-time mediator throughout California. He has over 28 years of experience successfully representing employees and employers in employment litigation, including PAGA cases, wage and hour class actions, harassment and discrimination claims, failure to accommodate, retaliation, and wrongful-termination claims. Mr. Appell became a full-time neutral in 2021, handling employment, contract, privacy, tort, and personal-injury cases. He may be reached through ARC-Alternative Resolution Centers, *barry@appellmediation.com, or bappell@arc4adr.com.*