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## PRIVATE ATTORNEYS GENERAL ACT

### CLASS WAIVERS

As courts increasingly uphold arbitration agreements and class action waivers, suits in California under the state Private Attorneys General Act will become more common and perhaps even very prevalent, in place of class actions, attorney Robert S. Cooper says. The author explains the advantages and disadvantages for employers in dealing with PAGA claims and contrasts these representative claims with class actions.

### Claims in California Under the Private Attorneys General Act: Are They the ‘Waive’ of the Future?



BY ROBERT S. COOPER

**W**ith the recent validation by both the U.S. and California Supreme Courts of the enforceability of arbitration agreements containing waivers of an employee's right to participate in class actions, employers now have a powerful weapon that they can use

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to avoid becoming embroiled in a class action lawsuit.<sup>1</sup> However, the California Supreme Court's landmark decision last year in *Iskanian v. CLS Transportation Los Angeles, LLC* also ruled that waivers of employee claims brought under the *Labor Code Private Attorneys General Act of 2004* (PAGA), Cal. Labor Code sect. 2698, et. seq., are unenforceable in California state courts. The basis of the ruling was that PAGA claims are not really employee claims, but are merely actions brought on behalf of the state enforcement agencies, with the employee serving as a private attorney general, and these state agency rights therefore cannot be waived by an employee.<sup>2</sup>

Prior to *Iskanian*, however, PAGA claims were seldom litigated through trial, although they were very often included in employee class actions and single-plaintiff lawsuits, often as leverage for settlement rather than with the intent to litigate them. With California

<sup>1</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_; [179 L.Ed. 2d 742, 131 S. Ct. 1740] (2011); *Iskanian v. CLS Transportation L.A., LLC* 59 Cal. 4th 348 (2014)

<sup>2</sup> While the U.S. Supreme Court refused to accept cert of the *Iskanian* action, other cases relating to the PAGA waiver issue are working their way to the high court, which may eventually rule on the *Iskanian* court's "carve out" of PAGA waivers.

employers currently having the ability to make employees waive their participation in class actions but not their participation in a PAGA lawsuit, many have predicted that the *Iskanian* ruling would unleash a flood of PAGA claims, and by all reports, PAGA filings are up. We can certainly expect that PAGA lawsuits will become more common and perhaps even very prevalent, in place of class actions.

### What is a PAGA Claim?

A PAGA representative action is a type of *qui tam* action such as those available under federal and other state statutes. *Qui tam* literally means “in place of the king,” and such actions were first used in England in the 13<sup>th</sup> century, as a way to enforce the King’s laws.<sup>3</sup> Similar laws have existed in America since colonial times and several were enacted by the First Congress.<sup>4</sup> The Federal False Claims Act, 31 U.S.C. 3730, was enacted during the Civil War to counteract unscrupulous contractors who sold bad goods to the Union.<sup>5</sup>

As noted by the Supreme Court in *Iskanian*, “traditionally, the requirements for enforcement by a citizen in a *qui tam* action have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid to the informer; and (3) that, in some way, the informer be authorized to bring suit to recover the penalty. The PAGA conforms to these traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation. The government entity on whose behalf the plaintiff files suit is always the real party in interest in the suit.”<sup>6</sup>

### What Does a Proliferation of PAGA Claims Mean for California Employers?

There are both advantages and disadvantages for employers in dealing with PAGA claims as opposed to defending class actions. The PAGA law permits an employee to bring a civil action to recover civil penalties on behalf of himself or herself and other current or former employees with respect to any Labor Code provision for which the Labor and Workforce Development Agency or any of its departments could normally bring an action against an employer. Civil penalties recovered in a PAGA action are distributed 25 percent to the aggrieved employees and 75 percent goes to the state of California.

Given the 25 percent damages limitation, employees have had less incentive to bring PAGA claims up to now, when they can recover 100 percent of their damages in a normal class action lawsuit. Additionally, damages in PAGA claims are limited to “civil penalties.” Civil penalties are distinct from statutory penalties in the Labor Code. Statutory penalties are those recoverable directly by employees long before PAGA was enacted in the Labor Code, e.g., waiting time penalties

under section 203 (failure to pay wages due to employee at time of separation of employment, which authorizes the Labor Commissioner to impose a civil penalty in an amount not exceeding 30 days’ pay). Civil penalties, on the other hand, are those which were enforceable only by the state’s labor law enforcement agencies, such as the civil penalties imposed by Labor Code sect. 225.5, which subjects employers to a penalty of \$100 per employee for the initial violation and \$200 per employee for subsequent or willful violations of various Labor Code provisions.

The civil penalties available in a PAGA action brought on behalf of all employees similarly aggrieved could add up to large damages against a company, but damages would still tend to be smaller than those recoverable in a class action. The statute of limitations for PAGA actions is only one-year from the date of the alleged violation. (C.C.P. sect. 340)<sup>7</sup> The one-year statute of limitations serves to limit the damages recoverable as compared to normal action for Labor Code violations, for which the statute of limitations is normally three years, or four years if the violation can also be characterized as an unfair business practice under *Business & Professions Code* sect. 17200.<sup>8</sup>

Before bringing a PAGA action, an employee plaintiff must comply with Labor Code section 2699(a), which requires that the employee give written notice of the alleged Labor Code violations to both the employer and the Labor and Workforce Development Agency, which notice must describe the facts and theories supporting the violation. (Sect. 2699.3(a)).<sup>9</sup> If the agency notifies the employee and the employer that it does not intend to investigate or if the agency fails to respond within 33 days, the employee may then bring the civil action. (Id.) The exhaustion letter requirement is strictly construed and must be complied with carefully, since a failure to comply with a detailed enough exhaustion letter is ground for dismissing a PAGA claim.<sup>10</sup>

But although PAGA claims hold some disadvantages for plaintiffs as opposed to non-PAGA class actions, there are disadvantages for employers as well. As a preliminary matter, there is no need to certify a class in PAGA state court actions.<sup>11</sup> This eliminates what is often the biggest hurdle for plaintiffs in class action litigation, which is convincing the court that the commonality, numerosity, typicality and manageability of their claims warrant class action treatment, as opposed to individual case treatment. Although California appeals courts have held that plaintiffs need not adhere to class certification procedures in PAGA actions, this issue is still unresolved in federal courts, where there is a split of authority.<sup>12</sup>

<sup>7</sup> *Slay v. CVS Caremark Corp.*, 2015 BL 129717 (E.D. Cal. May 4, 2015).

<sup>8</sup> *Murphy v. Kenneth Cole Productions, Inc.* 40 Cal. 4th 1094 (2007).

<sup>9</sup> A different procedure exists under 2699.3(b) for PAGA claims involving safety issues and under 2699.3(c) for Labor Code sections not listed under the list of PAGA covered statutes; Section (c) claims provide a cure period.

<sup>10</sup> *Archila v. KFC U.S. Properties*, 420 Fed. Appx. 667, 669 (9th Cir. 2011).

<sup>11</sup> *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).

<sup>12</sup> In *Cardenas v. McLane Foodservice, Inc.*, 2011 BL 384274 (C.D. Cal. Jan. 31, 2011). The court held that PAGA is a law enforcement action and not a class action, therefore there is no conflict with Rule 23, the federal class action statute;

<sup>3</sup> *Vermont Agency of Nat. Resources v. U.S. ex rel Stevens*, 529 U.S. 765 (2000).

<sup>4</sup> See *Iskanian*, *supra*, pg. 382.

<sup>5</sup> Some have said the Federal False Claims Act stemmed from decrepit horses and bad mules being sold to the Union. [Wikipedia, See Qui Tam].

<sup>6</sup> *Iskanian*, *supra* at pg. 382.

Most importantly for plaintiffs, attorneys' fees are recoverable in PAGA actions. Not only can plaintiffs recover attorneys' fees, which will often dwarf the individual recovery of penalties, but they could also be entitled to a multiplier, because PAGA claims will automatically be deemed to be cases brought in the "public interest." This means that the total amount of reasonable attorneys' fees could have the base award multiplied, which in some cases could result in an award of 2 or 3 times the base amount.<sup>13</sup> The attorneys' fees issue alone makes PAGA claims attractive to the plaintiffs' bar, which likes to find ways to bring collective and representative actions with the potential for attorneys' fees recovery.

The court is required to approve any settlement of a PAGA action, based upon the statute.<sup>14</sup> This may serve to protect employers from unreasonable attorneys' fees awards, but the risk of large attorneys' fees is still present.

Because stand-alone PAGA claims have not tended to be litigated through trial until recently, there are still many uncertainties as to how courts will interpret the PAGA. There is virtually no guidance yet on discovery issues pertaining to plaintiffs' discovery of contact information of current and former employees for purposes of determining whether they are "similarly aggrieved" to the named plaintiff. It is the PAGA plaintiff's burden to prove Labor Code violations as to each and every employee on behalf of whom the PAGA claim is brought.<sup>15</sup> It would be expected that courts would adhere to the *Belaire-West* process and require disclosure of similarly aggrieved employee contact information using an opt-out or opt-in procedure, as utilized in class action litigation and collective actions.<sup>16</sup> However, no appellate court decision has yet so held in a stand-alone PAGA claim. If, as expected employee-contact information remains discoverable and courts find that employee privacy rights are outweighed by the need for discovery, it will be a powerful tool for plaintiffs to create leverage against employers in PAGA lawsuits.

Another open question regarding PAGA claims is whether they can be brought solely as an individual claim on behalf of the named plaintiff, or are they required to include other current or former employees. A California appellate court in *Reyes v. Macy's*, 202 Cal. App. 4th 1119 (2012) ruled that PAGA claims can never be individual claims, but must always be brought on behalf of the plaintiff and other similarly aggrieved employees. Thus, Macy's motion to compel arbitration of the PAGA claim was denied, although the plaintiff's individual claims were ordered to arbitration.<sup>17</sup> But a federal district court came to a different conclusion in *Fardig v. Hobby Lobby Stores, Inc.*, 2014 BL 173132 (C.D.

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however, in *Fields v. QSP, Inc.*, 2012 BL 411722 (C.D. Cal. June 4, 2012), the court held that PAGA is merely a procedural statute, and plaintiffs must and therefore meet the Rule 23 certification requirements for federal court class actions.

<sup>13</sup> *Graham v. Dailer Chrysler Corp.*, 34 Cal. 4th 553 (2004)

<sup>14</sup> Section 2699(l) states: "The superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part."

<sup>15</sup> *Hibbs-Rines v. Seagate Technologies*, 2009 BL 50991 (N.D. Cal. March 2, 2009).

<sup>16</sup> *Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554 (2007).

<sup>17</sup> *Reyes v. Macy's*, *supra*, 202 Cal. App. 4th 1119.

Cal. June 13, 2014)), finding that PAGA claims may be brought as an individual claim and compelled to be arbitrated.<sup>18</sup>

There has until very recently been little guidance on the procedure for litigating cases which have both individual claims subject to an enforceable arbitration provision under the *Iskanian* ruling, combined with a PAGA claim for which the arbitration clause is not enforceable under *Iskanian*. The question arises as to which claim should be litigated first, and which should be stayed, or whether the PAGA and non-PAGA claims can be litigated simultaneously in a different forum.

On February 26, 2015, the California Court of Appeal, Second Appellate District, decided *Franco v. Arakelian Enterprises, Inc.* 234 Cal. App. 4th 947, 965-966 (2015), and provided the first post-*Iskanian* guidance on this issue. After ordering plaintiff's individual claims to arbitration, and dismissing the plaintiff's class and representative allegations, the court stayed the PAGA claims pending completion of plaintiff's arbitration of his individual claims. In so holding, the Court relied upon C.C.P. section 1281.4, stating

Because the issues subject to litigation under the PAGA might overlap those that are subject to arbitration of Franco's individual claims, the trial court must order an appropriate stay of trial court proceedings. [C.C.P. sect. 1281.4]<sup>19</sup> The stay's purpose is to preserve the status quo until the arbitration is resolved, preventing any continuing trial court proceedings from disrupting and rendering ineffective the arbitrator's jurisdiction to decide issues that are subject to arbitration.<sup>20</sup>

The *Franco* decision could prove to be a boon for employers, since by defeating an employee's individual claims in arbitration first, employers might in some cases be able to attack the PAGA plaintiff as lacking in standing, since the named plaintiff's case had been defeated. This might require plaintiff's counsel to find a new named-plaintiff who has standing for the PAGA action to proceed. Again, there is not yet any guidance from the appellate courts on this issue.

## Defending PAGA Lawsuits

The *Franco* decision suggests that where the employer has an enforceable arbitration clause and class action waiver, defense counsel should move to compel arbitration of the plaintiff's individual claims first, and move to stay the PAGA action with the court. There are other strategies which employers' counsel should consider as well. Defense counsel should consider whether to mount a pleadings challenge to a PAGA action, based upon deficiencies in the exhaustion letter, as discussed in light of *Archila v. KFC U.S. Properties, Inc.*, 420 Fed. Appx. 667, 669 (9th Cir. 2011). There, proper notice of plaintiff's theories of liability was found to be lacking sufficient detail, and the PAGA claim was dismissed.<sup>21</sup>

Another successful attack on the pleadings in a PAGA case occurred in the federal district court in *Ortiz v. CVS Caremark Corp.*, where the court granted a

<sup>18</sup> *Fardig v. Hobby Lobby Stores, Inc.*, *supra*.

<sup>19</sup> C.C.P. sect. 1281.4 states that an action "shall be stayed" if "arbitration of a controversy which is an issue involved in an action or proceeding pending before a court" exists.

<sup>20</sup> *Franco v. Arakelian Enterprises, Inc.*, *supra*, 234 Cal. App. 4th 966.

<sup>21</sup> *Archila v. KFC*, *supra*, 420 Fed. Appx. at 669.

motion to strike the complaint under *Federal Rules of Civil Procedure*, Rule 12(f), and dismissed Plaintiff's PAGA lawsuit. In *Ortiz*, the district court dismissed plaintiff's PAGA claim after determining that litigating the matter would be "unmanageable" for the court, because it would involve numerous individualized factual inquiries regarding the various Labor Code violation claims.<sup>22</sup> In *Ortiz*, the Court had already dismissed Plaintiff's class action allegations pursuant to Rule 23.

Another basis for employers to defend PAGA suits is suggested by section 2699(e)(2), which states that

... a court may award a lesser amount than the maximum civil penalty amount specified by this part 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.

It is not clear what would serve to make an award "unjust, arbitrary, and oppressive, or confiscatory," although it appears that one of the things the legislature may have been contemplating was the potential for a very large PAGA award against a relatively small entity. This section of the PAGA statute is bolstered by section 2699(l), under which the court is required to "review and approve any penalties sought as part of a proposed settlement agreement. . . ."

Although federal courts have proven to be somewhat more hostile toward PAGA claims than California state courts, removal of stand-alone PAGA actions based upon the Class Action Fairness Act (based upon a showing of \$5 million at issue) or diversity jurisdiction has been ruled to be impermissible.<sup>23</sup> PAGA claims brought under section 2699.3 subd.(c) are subject to a 33-day cure provision which permits the employer to eliminate the Labor Code violation prior to plaintiff being permitted to file the PAGA claim. However, this subsection only pertains to a relatively small subset of Labor Code sections, those which are not listed in the laundry list of statutes contained under section 2699.5, and those which do not involve safety issues which are covered

<sup>22</sup> *Ortiz v. CVS Caremark Corp.*, 2014 BL 76203 (N.D. Cal. March 19, 2014).

<sup>23</sup> *Baumann v. Chase* 747 F.3d 1117 (9th Cir. 2014)) (PAGA actions not removable under the Class Action Fairness Act); *Urbino v. Orkin Servs. of Cal.*, 726 F.3d 1118 (9th Cir. 2013)) (damages of different aggrieved employees cannot be aggregated to satisfy diversity jurisdiction's \$75,000 threshold).

under subsection 2699.3(b). But where a claim stems from a Labor Code section which falls under 2699.3(c), for example any violation of Labor Code section 226.8 (willful misclassification of individual as independent contractor), the employer has the opportunity to prevent a PAGA claim by curing the alleged violation.

If early analysis of a PAGA lawsuit suggests that damages could be significant, and defenses are lacking, employers should consider early mediation to potentially minimize a large attorneys' fees award.

It remains to be seen what the future holds for PAGA litigation. In fact, the *Iskanian* "carve-out" of PAGA claims from enforcement under arbitration agreements may be short-lived. The U.S. Supreme Court has denied a petition for certiorari on this issue remains pending before the Supreme Court and the issue is also presently before the Ninth Circuit.<sup>24</sup> Additionally, federal district courts in California have almost uniformly rejected *Iskanian* and allowed arbitration waivers to be enforced even to the extent that they bar plaintiffs from bringing PAGA or other representative claims.<sup>25</sup> This suggests that the U.S. Supreme Court, applying federal law, could overrule *Iskanian* eventually.

But while *Iskanian* remains in force in California, employers will need to devise strategies to deal with PAGA lawsuits, which can be expected to proliferate.

<sup>24</sup> *Bridgestone Retail Operations LLC v. Brown*, No. 14-790; *Hopkins v. BCI Coca-Cola Bottling Company*, No. 13-56126. The *Bridgestone* case focuses on a different angle than *Iskanian*, asserting that the FAA preempts all statutory claims arising out of employment, without an exception for private plaintiff's claims merely because state law considers them to be brought "on behalf of the state."

<sup>25</sup> See *Estrada v. CleanNet USA, Inc.*, 2015 BL 47735 (N.D. Cal. Feb. 24, 2015) (collecting pre-*Iskanian* cases that found PAGA waivers enforceable and holding the *Iskanian* rule preempted to the extent it frustrates the FAA's goals); see also *Mill v. Kmart Corp.*, 2014 BL 334123 (N.D. Cal. Nov. 26, 2014) (declining to follow *Iskanian*); *Lucero v. Sears Holdings Mgmt. Corp.*, 2014 BL 341939 (S.D. Cal. Dec. 2, 2014) (same); *Langston v. 20/20 Companies, Inc.*, 2014 BL 300105 (C.D. Cal. Oct. 17, 2014) (same); *Chico v. Hilton Worldwide, Inc.*, 2014 BL 291353 (C.D. Cal. Oct. 7, 2014) (same); *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070 (E.D. Cal. Oct. 1, 2014) (same); *Fardig v. Hobby Lobby Stores Inc.* 2014 BL 173132 (C.D. Cal. Aug. 11, 2014) (same).