



Let's Talk PAGA:

Navigating Shifting
Case Law, New Theories,
and Defense Strategies

Series 2: Discovery Practice and Sequencing

Matthew Goodin

Elizabeth MacGregor

Daniel Whang

September 1, 2020

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Speakers



Matthew Goodin

Seyfarth Shaw
Senior Counsel
San Francisco
(415) 544-1071
MGoodin@seyfarth.com



Elizabeth MacGregor

Seyfarth Shaw
Associate
San Francisco
(415) 544-1065
EMacgregor@seyfarth.com



Daniel Whang

Seyfarth Shaw
Partner
Los Angeles
(310) 201-1539
DWhang@seyfarth.com



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2020 Seyfarth Shaw LLP. All rights reserved. Private and Confidential

Discovery Playbook



What Discovery to Expect?

1. Request for employee contact information
2. Policies
3. Time and pay records for potentially aggrieved employees
4. Information about employees (number of employees, pay periods, job positions, shifts, etc.)
5. Corporate depositions

Can A Plaintiff Get Contact Information?

Belaire-West Landscape, Inc. v. Superior Court

- Employees have privacy right in contact information (name, address, phone number)
- Court must balance privacy interest with competing interests. Opt-out process can adequately balance these interests.

Practical Considerations:

- Seek order permitting only for use in PAGA case to prevent solicitation of clients.
- Email addresses and electronic opt-out
- Notice to managers

Discovery of Employee Contact Information



Scope of *Belaire* Notice



Whose Information Can the Plaintiff Receive?

Williams v. Superior Court

- Rejected attempt to limit contact information to the single store where plaintiff worked
- Rejected argument that the plaintiff must first show that plaintiff or others are aggrieved

“We recognize that in a particular case there may be special reason to limit or postpone a representative plaintiff’s access to contact information for those he or she seeks to represent, but the default position is that such information is within the proper scope of discovery, an essential first step to prosecution of any representative action.”

Another Crazy PAGA Case

Huff v. Securitas Security Services USA, Inc.

- Because a PAGA action is not a class action, the plaintiff does not need to have personally experienced same violations as others
- A PAGA plaintiff can pursue penalties for violations that Plaintiff did not experience.
- Court of Appeal decision and not settled by California Supreme Court

Discovery Pitfalls



Discovery Pitfalls



Overreaching by Plaintiff Lawyers

Arguments by Plaintiff Lawyers:

- *Huff* entitles them to broad discovery to conduct an audit of employers
- *Williams* entitles them to this broad discovery for all employees in California

Responses:

- *Huff* did not involve discovery and did not authorize fishing expeditions.
- *Williams* only involved contact information, which the Court states was “essential first step to prosecution of any representative action.”

Strategies to Limit Discovery



Are There Ways to Limit Discovery?

- Limit discovery to what is asserted in PAGA letter and complaint
 - Potential value in demurrers to force plaintiffs to articulate theory of liability and limit discovery to those theories.
- Time limitations
 - One year plus 65 days
- Undue burden
 - Sampling of records
 - Statistical sampling vs. statistical significance

Are There Ways to Limit Discovery?

Strategies to Limit Discovery

- Narrow discovery by curing violations, if cure is available under PAGA
 - Wage statements
 - Any violations not listed in section 2699.5
- Protective orders challenging futility of evidence (e.g., time cards for off-the-clock claim)



CLE CODE

Strategies to Limit Discovery



Are There Ways to Limit Discovery?

- Require subpoenas under CCP § 1985.6
 - Potentially aggrieved employees are not parties to the PAGA action so arguably need subpoena under section 1985.6 for employment records.
 - Like a *Belaire* notice, employees should be given opportunity to decide whether to have employment records produced.
 - Redacting names is burdensome and may not adequately protect identity of employee.
 - Costly and difficult to do, especially if there is a large group of potentially aggrieved employees.

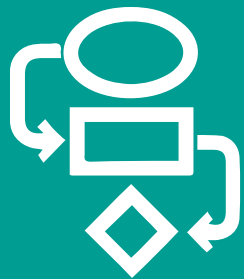
Strategies to Phase Discovery



Can Discovery be Phased?

- In hybrid class and PAGA case, seek to phase discovery to focus on certification issues first
 - Better chance of limiting discovery to smaller population of employees
 - Better chance of avoiding fishing expedition
- Limit initial discovery to individual plaintiff
 - Judicial economy to determine whether plaintiff has standing
 - Identify how plaintiff is unique or is unlikely to have standing (e.g., unique position, short employment)

Sequencing of Discovery in a PAGA Case Can Be Done



Factors to Consider

- Documents or data cannot prove violations at trial (e.g., rest periods, off-the-clock work)
- Individualized testimony will be necessary to prove violations
- Plaintiff lacks knowledge of whether or how other employees could have experienced violations
- Trial will be unmanageable
- Excessive burden on defendant to comply with discovery while no prejudice to plaintiff if discovery sequenced or limited to plaintiff

Judicial Assignment is Key

- Use CCP 170.6 if necessary
- PAGA only case is unlikely to be in federal court
- Discovery referee

**The Most
Important
Consideration**



PAGA Webinar Series Schedule



- **Series 1: PAGA Peculiarities** - [Webinar Recording](#)
Tuesday, August 18, 2020
- **Series 2: Discovery Practice and Sequencing**
Tuesday, September 1, 2020
- **Series 3: Novel PAGA Theories**
Tuesday, October 13, 2020
- **Series 4: Motion Practice, Manageability,
and Trial Plans**
Tuesday, November 10, 2020
- **Series 5: Settlement Strategies
and Curing Issues**
Tuesday, December 15, 2020



Thank You!