



Let's Talk PAGA:

Attacking Plaintiff's Case

Series 4: Motion Practice, Manageability, and Trial Plans

Eric Lloyd
Ryan McCoy
David Rosenberg
Sheryl Skibbe

December 8, 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



Eric Lloyd

Seyfarth Shaw
Partner

San Francisco
(415) 544-1060

ELloyd@seyfarth.com



Ryan McCoy

Seyfarth Shaw
Associate

San Francisco
(415) 544-1032

RMcCoy@seyfarth.com



David Rosenberg

Seyfarth Shaw
Associate

Los Angeles
(310) 201-5247

DRosenberg@seyfarth.com



Sheryl Skibbe

Seyfarth Shaw
Partner

Los Angeles
(310) 201-1534

SSkibbe@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

Agenda



- 01** PAGA and Manageability in State and Federal Courts
- 02** Early Requests for Trial Plans
- 03** Trial Plans After Development of the Evidentiary Record
- 04** What Happens Next?

PAGA Peculiarities

Recap on PAGA Peculiarities

PAGA Standing Is A Low Bar

- A PAGA plaintiff need only:
 - Be currently or previously employed by the alleged violator of the Labor Code; and,
 - Suffered one or more Labor Code violations, e.g., a late meal period.
- PAGA plaintiffs are not required to have experienced the same violations as other “Aggrieved Employees” (*Huff v. Securitas Security Serv.*, Cal. Ct. App. 2018).

CA class certification rules do not apply; FRCP 23 likely does not apply.

Introduction to Manageability Requirements

Manageability 101

- **What is “manageability”?**

Concept that, for claims to proceed to trial on a representative basis, they must be subject to some form of “common proof.”

- **Why should it apply?**

Because determining liability must be accomplished without sacrificing an employer’s due process rights.

- **Where do concerns arise?**

Where individualized inquiries are required to determine whether any Labor Code violations were committed.

- **Has the California Supreme Court recognized this concept?**

Yes, it has recognized that trial manageability is a basic prerequisite for PAGA actions (*See Williams v. Superior Court*, 3 Cal. 5th 531, 559 (2017)).

Courts Are Split On Whether PAGA Claims Are Subject To Manageability Requirements

Application of Manageability Requirements

California Trial Courts

- Many California trial courts have imposed a manageability requirement:
 - *See, e.g., Khan v. Dunn-Edward Corp.*, 2016 WL 1243588, at *1 (Cal. Sup. Ct. Los Angeles Cty. Jan. 29, 2016) (“permitting Khan’s case to proceed on a representative basis will create an unmanageable case”); *Banta v. American Medical Response Inc.*, No. BC393113 (Cal. Sup. Ct. Los Angeles Super. Cty., Apr. 25, 2018) (striking PAGA claim as unmanageable).
- Meanwhile, other courts have reached the opposite conclusion:
 - *See, e.g., Rusom v Tissue Banks I*, 2017 WL 1047145, at *2 (Cal. Sup. Ct. Contra Costa Cty., Feb. 16, 2017) (“There is no law in California that PAGA claims have to be ‘manageable.’”)

Application of Manageability Requirements

Courts Are Split On Whether PAGA Claims Are Subject To Manageability Requirements

Federal District Courts

- The same split of authority exists in federal court.
- A number of District Courts have imposed a manageability requirement:
 - See, e.g., *Amiri v. Cox Comnc'ns California, LLC*, 272 F. Supp. 3d 1187, 1195, 1197 (C.D. Cal. 2017) (striking PAGA claim as unmanageable where “liability determinations will require individualized inquiries”); *Ortiz v. CVS Caremark Corp.*, 2014 WL 1117614 at *4-5 (N.D. Cal. March 19, 2014) (“the circumstances of this case make the PAGA claim here unmanageable because a multitude of individualized assessments would be necessary”);
- However, others have found manageability to be inconsistent with PAGA’s purpose:
 - See, e.g., *Zackaria v. Wal-Mart Stores, Inc.*, 142 F.Supp.3d 949, 958 (C.D. Cal. 2015) (“[T]he court finds defendant’s manageability argument inconsistent with PAGA’s purpose and statutory scheme”).

Highlighting Manageability Concerns: *Early and Often*

Importance Of Developing A Factual Record To Support Manageability Concerns

- **Why is it important?**
 - Without a developed factual record highlighting the variations amongst employees, employers limit their ability to challenge PAGA claims based on manageability and due process concerns.
- **What factors should be considered?**
 - *Quantitative Factors:* Number of employees, job positions, departments, and geographic regions or work locations at issue.
 - *Qualitative Factors:* Variations in job duties by position, department, work location, and geographic regions at issue.

Highlighting Manageability Concerns: *Early and Often*

How to Effectively Raise Manageability Concerns

- ***Pleading stage:*** Identify and attack allegations showing any representative trial would be unmanageable because of individualized issues.
 - Seeking to pursue penalties on behalf of all employees state wide?
 - What **evidence** is that based on?
- ***Initial CMC:*** Call out those issues and request trial plan at the initial status conference to prime the court.
- ***Beginning of Discovery:*** Seek sequencing of discovery before wholesale discovery is permitted.
 - C.C.P. § 2019.020(b) (“for good cause shown,” the court may establish “the sequence and timing of discovery...”)

Raising Manageability Concerns: *Early and Often*

Raising Manageability Concerns

- Formulate discovery responses to raise manageability concerns.
 - Be proactive in addressing discovery problems.
- Gain key admissions at plaintiff's deposition about the scope of allegations, knowledge as to practices outside their location/position, etc.
- Trial plan, trial plan, trial plan.
 - Keep the pressure on plaintiff to articulate how they intend to try their representative claims in a manageable way, consistent with due process.

How to Try A Representative Action?

A PAGA action is not an individual action but a representative action brought by plaintiff as a private attorney general for the State of California on behalf of other “aggrieved employees.”

So how are these cases to be tried if the number of employees on whose behalf the case is brought numbers more than can easily testify?”

- Plaintiff must **show** through a **trial plan** that she/he can present evidence of a **common policy affecting** all “aggrieved employees” alike.

Painting the Picture

What Will Trial Look Like

A trial plan is a document that describes, among other things, the claims and theories of liability, the witnesses and evidence that will be used to prove those claims, and how the presentation of evidence on behalf of the group of aggrieved employees will proceed.

- The number of witnesses needed to testify for a statistically significant sample size.
- The type of experts and the scope of expert testimony.
- The number and type of documents to be introduced.
- The amount of time for trial.

Motion For A Trial Plan

In courts that do not regularly require trial plans, the defendant has two hurdles to overcome in getting the judge to order a trial plan:

1. Explain what a trial plan is, why it is different than a scheduling or trial management order, and why it might be useful;
2. Convince the judge to exercise his or her discretion to order one.

Questions to Answer

Answers

Convincing the Court

1. The manageability inquiry prevents concerns regarding the adjudication of individualized issues resulting in numerous hearings on individualized questions of law and fact.
2. A trial plan will avoid wasting scarce judicial resources and will avoid due process violations by identifying prior to trial the employees on whose behalf the plaintiff seeks to litigate Labor Code violations and which employees will be bound by the outcome of the litigation.

Grounds for a Trial Plan Requirement

If Defendant Must Bring a Motion:

- Because PAGA cases do not have to meet class action requirements of commonality, predominance, adequacy and numerosity, the court's ability to **control its docket** becomes paramount.
 - California courts “have inherent equity, supervisory and administrative powers as well as inherent power to control litigation before them.” See *Cottle v. Sup. Ct.*, 3 Cal. App. 4th 1367 (1992); *Western Steel & Ship Repair, Inc. v. RMI, Inc.*, 176 Cal. App. 3 1108, 1116-1117 (1986).
- The California Supreme Court in *Williams v. Sup. Ct.* also supports employers' arguments that trial manageability is a basic prerequisite for PAGA actions.

The PAGA plaintiff bears the burden of proving that the case is manageable or the case cannot proceed as a representative action.

Claims With Variability and Claims with Common Issues

Dismissal of Overtime Claims

***Brown v. Am. Airlines, Inc.*, No. CV-10-8431-AG,
2015 WL 6735217 (C.D. Cal. Oct. 5, 2015)**

The court struck the PAGA representative claims based on the alleged failure to pay overtime. Noting its earlier conclusion that individual inquiries predominated as to the overtime claims (when denying class certification), the court determined that there would be “too many individualized assessments to determine PAGA violations concerning overtime pay.” As for an inaccurate wage statement claim, the court held that the wage statement claims, which were based on allegations that wage statements improperly reflected two different pay periods, were not unmanageable.

Use Discovery to Show Variation

A Fact-Based Motion After Discovery

***Wesson v. Staples*, Los Angeles Superior Court No. BC593889 (Oct. 11, 2019)**

The court struck the PAGA representative claims based on misclassification theory involving 356 employees in the *same* job classification. “Plaintiff’s trial plan seeks to aggregate claims pertaining to hundreds of individuals [General Managers], who, to be sure, work for the same employer in the same job category, but as to whom a Labor Code violation can be proved only by considering the individual daily work habits of such employees. Four years of trial time cannot be devoted to the use of the PAGA procedural device in this manner.” (Id. at 21.)

CLE CODE

Extrapolation and Representative Evidence

Typical Trial Plans

Plaintiffs often submit trial plans that suggest:

- Surveys/questionnaires;
- Testimony from a small number of cherry-picked employees to be extrapolated to a larger group;
- Expert witness testimony to replace employee testimony (*e.g. deposition summaries, review of documents and survey responses*);
- Company witnesses testifying about company policies.

Such Plans Are Scientifically Invalid and Deprive Defendants of Due Process

Such Plans Fail Scientific Scrutiny

Sampling based on the testimony of cherry-picked employees:

- Not randomly selected employees.
- The sample size is too small and fails to meet accepted statistical extrapolation practices that result in a margin of error of no greater than 5% with a confidence interval of 95% (*Duran v. U.S. Bank*, 59 Cal. 4th 1, 46 (2014)).
- Summaries and surveys do not permit defendant to cross-examine the witnesses.
- Summaries also invade the province of the finder of fact by not permitting the person deciding the claims to determine credibility or assess accuracy of the responses or the witness's memory.

The defendant also cannot be deprived of its right to litigate its defenses. The defendant must have the right to present its own evidence and witnesses.

Rejection of An Expert Witness- Based Trial Plan

A Fact-Based Motion After Discovery

Zhang v. Amgen, Inc.

Case No. 56-2012-00420162-CU-OE-VTA
(Ventura County, August 13, 2015), (also
misclassification claims)

“Based on the evidence presented, the court believes that the variance in what the plaintiffs do is sufficiently varied that using Mr. Zhang, and what he does, is not a valid measure of what the others do.” The court further rejected the argument that an expert could utilize questions to “lead to a valid statistical consensus of what all of these employees have in common.”

After Court Ruling

What happens after the court rules on the sufficiency of the trial plan?

If the court approves the plan:

- The case will proceed to trial.

If the court rejects the plan:

- Plaintiff may be permitted to pursue trial as to a limited set of employees or claims.
- Plaintiff may receive an opportunity to submit a new trial plan.
- Individual settlements have been complicated by the California Supreme Court's decision in *Kim v. Reins International*.

PAGA Webinar Series Schedule



- **Series 1: PAGA Peculiarities**
Tuesday, August 18, 2020 | [Webinar Recording](#)
- **Series 2: Discovery Practice and Sequencing**
Tuesday, September 1, 2020 | [Webinar Recording](#)
- **Series 3: Novel PAGA Theories and Discretionary Reductions in Penalty Awards**
Tuesday, November 10, 2020 | [Webinar Recording](#)
- **Series 4: Motion Practice, Manageability, and Trial Plans**
Tuesday, December 8, 2020
- **Series 5: PAGA Settlement Strategies**
Tuesday, December 15, 2020

Contact



Eric Lloyd

Seyfarth Shaw
Partner

San Francisco
(415) 544-1060

ELloyd@seyfarth.com



Ryan McCoy

Seyfarth Shaw
Associate

San Francisco
(415) 544-1032

RMcCoy@seyfarth.com



David Rosenberg

Seyfarth Shaw
Associate

Los Angeles
(310) 201-5247

DRosenberg@seyfarth.com

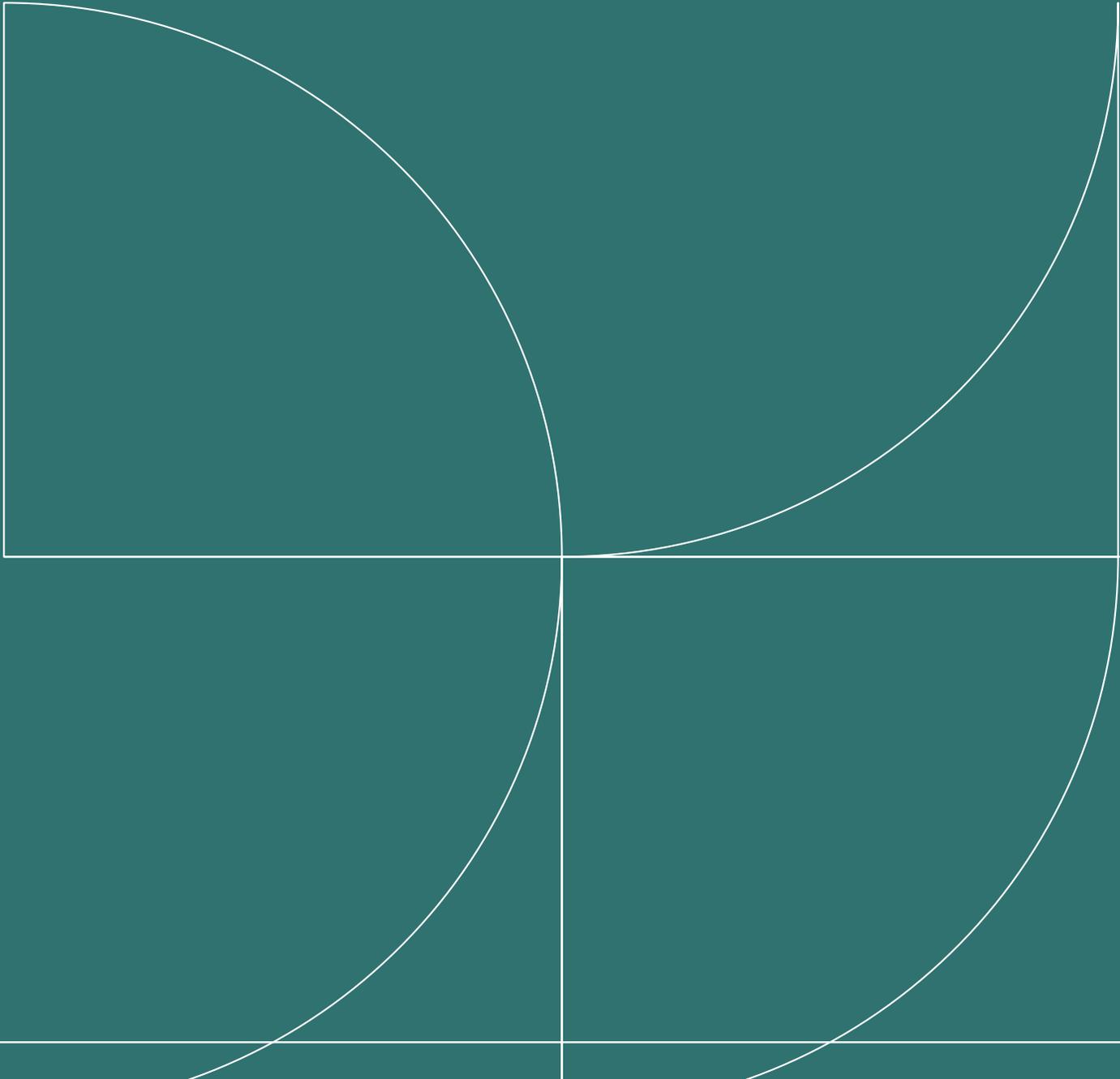


Sheryl Skibbe

Seyfarth Shaw
Partner

Los Angeles
(310) 201-1534

SSkibbe@seyfarth.com



Thank You!