



# Let's Talk PAGA:

Navigating Shifting Case Law, New Theories, and Defense Strategies

## Series 3: Novel PAGA Theories and Discretionary Reductions in Penalty Awards

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Seyfarth Shaw LLP

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# Agenda



- 01** Wage Order Section 15's Reasonable Indoor Temperature Requirement
- 02** PAGA as a Vehicle for OSHA Claims
- 03** Judicial Discretion in PAGA Penalty Awards

# Wage Order Section 15

## Temperature

### Requirement that Employers Provide Reasonably Comfortable Indoor Temperatures

- A. The temperature maintained in each work area shall provide reasonable comfort consistent with industry-wide standards for the nature of the process and the work performed.
- B. If excess heat or humidity is created by the work process, the employer shall take all feasible means to reduce such excessive heat or humidity to a degree providing reasonable comfort. Where the nature of the work requires a temperature of less than 60° F., a heated room shall be provided to which employees may retire for warmth, and such room shall be maintained at not less than 68°.
- C. A temperature of not less than 68° shall be maintained in the toilet rooms, resting rooms, and changing rooms during hours of use.
- D. Federal and State energy guidelines shall prevail over any conflicting provisions of this section.

# Wage Order Section 15

## Temperature

### Requirement that Employers Provide Reasonably Comfortable Indoor Temperatures

#### Who is Being Targeted?

- Retailers with distribution depots and e-commerce depots in California.

#### What are Plaintiffs Claiming?

- That work areas lacking air conditioning and heating are too hot in the summer and too cold in the winter.
- Employees are referencing a pending California OSHA rule regarding indoor temperatures as support for their position.

#### What is at Stake?

- Penalties of \$100-200 per employee, per pay period.

# Wage Order Section 15

## Temperature

# Requirement that Employers Provide Reasonably Comfortable Indoor Temperatures

## Defense Strategies

- **Reasonable Comfort:**  
This requirement is overly vague and individualized. Lends itself to attacks on manageability.
- **Industry-Wide Standards:**  
This requirement is also overly vague, and invites employers to define the industry themselves.
- **Nature of the Process and the Work Performed:**  
The work area may be very difficult and expensive to air condition. The work performed is individualized.

# PAGA Claims Based on Violations of Cal/OSHA

- It's no surprise that employers in California have faced an endless surge in representative actions under PAGA, particularly for wage-hour violations of the California Labor Code.
- One relatively quiet area that has yet to see an increase in litigation is PAGA claims alleging violations of Cal/OSHA health and safety laws, as set forth in California Labor Code §§ 6300 et seq.
- These types of claims have been relatively rare, but are sure to pick up steam as more plaintiffs' lawyers discover this novel theory of liability to support PAGA penalties.



# Background on Cal/OSHA and PAGA Lawsuits

## What is Cal/OSHA?

- Cal/OSHA is the California Occupational Safety and Health Act of 1973.
- The provisions of Cal/OSHA are intended to “assur[e] safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for ... enforcement in the field of occupational safety and health.”

## How Can the Employee Bring a PAGA Lawsuit for Cal/OSHA Violations?

- The employee must first give notice to the LWDA and to the Division of Occupational Health and Safety (“Division”). (Cal. Labor Code § 2699.3(b)(1).)
- The Division is then required to investigate. (Cal. Labor Code § 2699.3(b)(2)(A).)
- If the Division issues a citation, then no PAGA action is allowed.
- If the Division does not issue a citation, the employee may file a PAGA lawsuit. But these initial exhaustion steps are required before an employee can actually proceed with the lawsuit.

# Examples of Cal/OSHA Claims Under PAGA

## How have we traditionally seen Cal/OSHA claims brought under PAGA, and what types of Cal/OSHA PAGA claims might be out there?

- Failure to provide a place of employment that is safe and healthful (Labor Code § 6400);
- Failure to furnish and use safety devices and safeguards, and adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful (Labor Code § 6401);
- Failure to implement and maintain an effective written injury prevention program (Labor Code § 6401.7);
- Requiring or permitting an employee to go or be in any employment or place of employment which is not safe and healthful (Labor Code § 6402); and
- Failure or neglect to provide and use reasonably adequate safety devices and safeguards or adopt or use reasonably adequate methods and processes, or to do every other thing reasonably necessary to protect the life, safety and health of employees (Labor Code § 6403).

**One Recent Example:** A California retailer faced a lawsuit under PAGA based on allegations that the earpieces, walkie-talkies, and radios it provided to employees were “unsanitary” because employees had to share.

# Cal/OSHA and PAGA in the COVID-19 World

We have anticipated — and are starting to see — more PAGA litigation based on Cal/OSHA violations due to the COVID-19 pandemic and the inherent workplace health and safety issues that may (inevitably) arise.

# Examples of Potential Issues

- Failure to take individual measures and screening such as temperature checks and pre-shift screening;
- Failure to provide employees with their own equipment to prevent the spread of disease or illness;
- Failure to have a written illness prevention program or provide training;
- Failure to provide washing facilities to maintain cleanliness;
- Failure to provide or require the appropriate levels of personal protective equipment;
  - Cal/OSHA requires employers to conduct a hazard assessment to determine if any PPE is needed to protect employees from hazards that are present or are likely to be present in the workplace.
- Failure to establish infection prevention measures such as encouraging sick employees to stay home, implementing social distancing protocols, or establishing procedures to routinely disinfect and clean commonly used surfaces; and
- Failure to provide illness prevention training.

# Best Practices

What are the best practices to try and limit potential liability under PAGA for Cal/OSHA violations?

# CLE CODE

# Potential Exposure

## PAGA Penalties

- The statute assesses penalties for **each pay period** an aggrieved employee suffered a Labor Code violation during the statute of limitations period (one year from the date the employee exhausts administrative remedies).
- Civil penalties are at most **\$100 for each aggrieved employee per pay period** for the initial violation, and **\$200 for each subsequent violation**.

## Challenges Estimating PAGA Penalties

- Courts have not clearly defined when a **subsequent violation** occurs, and the potential \$200 penalty kicks in.
- Whether plaintiffs can **“stack” penalties** for multiple predicate labor code violations in a single pay period remains unclear, and is discretionary.
- Courts have wide **discretion** to award less than the full statutory penalty, and usually award far less.

# Potential Exposure

## Standard

- Pursuant to the California Labor Code, a court has discretion to reduce a PAGA penalty 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.” Cal. Lab. Code § 2699(e)(2).
- *Romo v. GMRI, Inc.*, 2014 WL 11320647, at \*7 (C.D. Cal. Feb. 18, 2014) (“The court retains discretion over awards under a PAGA claim . . . .”); *Cardenas v. McLane Foodservice, Inc.*, 2011 WL 379413, at \*4 (C.D. Cal. Jan. 31, 2011) (“The PAGA text also provides the Court with the discretion to limit the amount Plaintiffs may recover from the employer.”); *Bright v. 99c Only Stores*, 189 Cal. App. 4th 1472, 1480 n.8 (2010) (“The trial court has discretion to award less than the maximum amount of the civil penalty . . . .”). Thus, courts have broad discretion to award PAGA penalties as they see fit.
- We want to talk about two recent cases to explore the application of this standard, *Magadia v. Wal-Mart*, and *Gola v. University of San Francisco*.



# *Magadia v. Wal-Mart Associates, Inc.*

May 31, 2019

Judge Lucy Koh

USDC, Northern District, in  
San Jose Division.

## Currently on Appeal to the 9<sup>th</sup> Circuit

- Plaintiff brought a variety of wage-hour claims, including alleging that Wal-Mart's California employees were not provided proper compensation for missed meal periods and did not receive compliant wage statements.
- Award was issued after a three day bench trial was conducted in late 2018.
- The Court **awarded \$70,000 in PAGA penalties to Wal-Mart employees for Wal-Mart's violation of Cal. Lab. Code § 226.7** for failure to provide compliant meal periods;
- The Court **awarded \$48,046,000 in PAGA penalties to the OVERTIME/INCT Wage Statement class** for Wal-Mart's violation of § 226(a)(9). The amount of PAGA penalties awarded to this class matched 100% the amount of § 226(e) statutory damages awarded, and is approximately 36% of the original amount of PAGA penalties Plaintiffs requested. "The law supports the Court's decision to reduce the PAGA penalties."
- The Court **awarded \$5,785,700 in PAGA penalties** to the Final Wage Statement Class for Wal-Mart's violations of § 226(a)(6).
- **Total PAGA award of roughly \$54 million, on top of a statutory penalty award of \$48 million = nearly \$102 million.**
- And the overall PAGA award alone **could have exceed \$130 million**, as plaintiff requested.

# Defense

## Whether Awarding PAGA Penalties and § 226(e) Damages Constitutes Impermissible Double Recovery?

### Awarding both PAGA damages and § 226(e) penalties would not constitute impermissible double recovery, said Judge Koh.

- The California Court of Appeal has held that for violations of § 226(a), “[t]here are three different potential remedies available . . . (1) actual damages or statutory penalties; (2) injunctive relief; and (3) civil penalties.” *Raines v. Coastal Pac. Food Distribs., Inc.*, 23 Cal. App. 5th 667, 673 (2018) (emphasis added). The California Supreme Court has held that PAGA damages are awarded as civil penalties. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 381 (2014). Thus, because PAGA damages are civil penalties and are of a different nature than the statutory penalties provided for in § 226(e), recovering both civil penalties and statutory penalties would not constitute impermissible double recovery for the same underlying violation of the California Labor Code.
- The Court acknowledged countervailing authority that stands for the proposition that recovery under both PAGA and additional Labor Code sections would be impermissible. But, the recent California Court of Appeal *Raines* case makes it clear that for violations of § 226(a), Plaintiffs have the option of seeking both civil penalties (i.e., under PAGA) and statutory penalties (i.e., under §226(e)). 23 Cal. App. 5th at 673. “As this Court is sitting in diversity, the California courts’ enunciation of the law is binding. Therefore, awarding damages under both PAGA and § 226 does not constitute duplicative recovery.”

# Defense

## Whether Awarding PAGA Penalties Would Violate Due Process and the Excessive Fines Clause?

- Wal-Mart claimed that awarding PAGA penalties would first, violate the Eighth Amendment's Excessive Fines Clause, and second, violate due process.
- No, the Eighth Amendment's Excessive Fines Clause does not apply here said the Court because the case involves only private parties. Moreover, there is a nexus between PAGA penalties awarded and the harm suffered via an underlying violation of the Labor Code because a PAGA cause of action is available for litigants to vindicate their rights under the Labor Code. Thus, awarding PAGA penalties does not violate due process.
- The Court also said it did not matter that the State is actually the real party in interest in a PAGA action (and thus not a private party); rather it was really the plaintiff who was litigating the case and standing in the State's shoes as a private party litigant.

# Defense

## Walmart Attacked the Credibility of Plaintiff's Expert, Dr. Kriegler

- Wal-Mart asserted that because Dr. Kriegler “failed to show his work,” his damages calculations should not be trusted.
- The Court disagreed, citing authority that “[I]f an expert reliably applies the appropriate legal formula to determine damages in a particular case, then that expert’s methodology is reliable.” *Nationwide Trans. Fin. v. Cass Info. Sys., Inc.*, 2006 WL 5242377, at \*3 (D. Nev. Mar. 6, 2006).
- The Court found Dr. Kriegler testified at length as to how his computational code was programmed to arrive at his damages calculations, and noted that this code was also provided to Wal-Mart.

**Notably and astonishingly, Wal-Mart did not call its own rebuttal damages expert, which along with the overall damages award, is one of the most remarkable things about the case.**

# *Gola v. University of San Francisco*

July 21, 2020

Judge Curtis Karnow

San Francisco Superior  
Court

- Class of part-time, Adjunct Professors sued USF based on non-compliant wage statements under Labor Code section 226, among other claims.
- **After a bench trial on that claim, the Court awarded \$1,621,600 in statutory damages, and an additional \$545,235 in PAGA penalties, based just on the 226 wage statement claim.**
- Plaintiff sought 100% of the potential PAGA penalties, or \$3,634,900.
- Court's PAGA award was 15% of that maximum.
- That was based on Court's view that defendant USF acted with "reckless ignorance of the law," but not an intent to harm the class members.

# *Gola v. University of San Francisco*

## Key Takeaways

### *Gola v. University of San Francisco*

- The *Gola* Proposed Statement of Decision is the most recent, thorough, and thoughtful explication of all of the factors that go into courts' discretion as to PAGA awards
- Cites many state and federal cases and secondary sources.

#### **Identifies Three Main Approaches:**

- Adjust percentage of maximum penalties (the direct statutorily prescribed procedure);
- Evaluate propriety of absolute dollars awarded;
- Review ratio of PAGA penalties to damages (statutory or actual).
- They are all compatible, many cases use a mix.

## *Gola v. University of San Francisco*

# *Gola v. University of San Francisco*

### Key Takeaways

Based on surveying every case out there, the Court finds they create a range, or “market” for PAGA penalties awards, from 10% to 100% of maximum potential, based on key factors:

- Defendant’s ability to pay;
- Attempts to correct violations before or after suit is filed;
- Whether there were prior complaints on same issues;
- Whether employees suffered no actual injury

**Main point here, as in *Magadia*, was that defendant *still* had not corrected the wage statements.**

# 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
- **Series 4: Motion Practice, Manageability, and Trial Plans**  
Tuesday, December 8, 2020
- **Series 5: Settlement Strategies and Curing Issues**  
Tuesday, December 15, 2020



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**Thank You!**