

# Management Alert



## Paltry Prerequisites for PAGA Penalty Paystub Plaintiffs

By Elizabeth M. Levy and David D. Kadue

**Seyfarth Synopsis:** California employees who are denied adequate wage statements (“paystubs”) can sue for penalties. Paystub penalty plaintiffs generally must prove they suffered an “injury” caused by the employer’s “knowing and intentional failure” to provide an adequate paystub. But now the Court of Appeal, *Lopez v. Friant & Associates, LLC*, holds that penalty-seeking employees can circumvent these proof requirements by suing for paystub penalties under PAGA. It remains unclear if PAGA plaintiffs are entitled to the default penalties that PAGA provides or instead must be satisfied with certain pre-existing civil penalties.

### PAGA Background

The California Legislature, with its extremely dour view of employers, has promulgated hundreds of Labor Code provisions that closely regulate virtually every aspect of the employment relationship, all with the stated goal of protecting employees against abusive employers. And, convinced that too many employers get away with too much, the Legislature has assigned a large civil penalty for virtually every Labor Code violation. To induce employer compliance, the Legislature, in the Labor Code Private Attorneys General Act of 2004 (“PAGA”), assigned a default penalty for each Labor Code violation for which a civil penalty was not already provided.

At the same time, convinced that the California Labor Commissioner lacked enough resources to prosecute Labor Code violations vigorously, the Legislature deputized “aggrieved” employees to sue in the Labor Commissioner’s stead. A PAGA plaintiff can sue an employer for the civil penalty previously provided or can sue for the PAGA default civil penalty of \$100 per aggrieved employee per pay period (or \$200 per employee per pay period for repeat offenders).

### The Lopez Case

Labor Code section 226(a) specifies nine ways employers may violate their duty to provide itemized paystubs. Section 226(e)(1) provides that an employee “suffering injury” as a result of an employer’s “knowing and intentional failure” to comply with Section 226(a) can recover the greater of actual damages or \$50 for the first pay period in which the violation occurs and \$100 for each further pay period, up to a maximum “aggregate penalty” of \$4,000 per employee.

Meanwhile, Labor Code section 226.3 provides for a “civil penalty” for violations of Section 226(a): \$250 per employee per violation for an initial citation, and \$1,000 per employee for each violation in a further citation.

Eduardo Lopez claimed that his employer, Friant & Associates, LLC, violated Section 226 by failing to include his Social Security Number or his employee identification number on his itemized wage statements. Friant acknowledged that it had inadvertently issued wage statements without such a number, and promptly resolved the problem.

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That was not enough for Lopez. He sought penalties. He pursued a claim solely under PAGA, rather than seeking penalties under Section 226(e). The trial court granted Friant's motion for summary judgment because Lopez failed to show the "knowing and intentional" violation that Section 226(e)(1) requires.

## The Court of Appeal's Decision

On appeal, Lopez argued that Section 226(e)'s proof prerequisites do not apply in a PAGA action, and the Court of Appeal agreed. The Court of Appeal reasoned that Section 226(e) describes a claim for damages and "statutory penalties," while Lopez was suing under PAGA for "civil penalties." Because Lopez was making a "civil penalty" claim distinct from a Section 226(e) "statutory penalty" claim, he did not have to prove he "suffer[ed] injury" because of Friant's "knowing and intentional failure" to provide a compliant wage statement. To buttress its point, the Court of Appeal observed that the Labor Code, in discussing the procedural requirements for a PAGA suit, does not refer to Section 226(e) but does refer to Section 226(a). The Court of Appeal thus concluded that Lopez can sue for PAGA penalties without establishing the "injury" and "knowing and intentional" elements of a Section 226(e) claim.

## What *Lopez* Means For Employers

*Lopez* makes worse what was bad enough already. Employers already were subject to draconian penalties for trivial imperfections in paystubs that often are inadvertent and cause no real harm to anyone. Now "aggrieved employees," under PAGA, can seek penalties even while admitting they have suffered no injury at all, and even while admitting that the employer's technical mistake was neither knowing nor intentional. *Lopez*, if not corrected by the Legislature or the California Supreme Court, will doubtless inspire even more paystub suits, achieving no real benefit while simply benefiting opportunistic plaintiffs' attorneys.

An issue that *Lopez* leaves open is whether successful PAGA paystub plaintiffs recover the default PAGA penalty (\$100 or \$200 per employee per pay period) or the pre-existing civil penalty that Section 226.3 provides for paystub violations. In either event, the employer would be deprived of the \$4,000 per-employee cap of Section 226(e).

Meanwhile, *Lopez* obviously reinforces the need to regularly review wage statements to ensure that they fully comply with Section 226(a).

If you would like further information, please contact [Elizabeth M. Levy](mailto:el Levy@seyfarth.com) at [el Levy@seyfarth.com](mailto:el Levy@seyfarth.com) or [David D. Kadue](mailto:David D. Kadue@seyfarth.com) at [dkadue@seyfarth.com](mailto:dkadue@seyfarth.com).

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