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Mediating wage-and-hour claims

A LOOK AT MEDIATION OF THE MOST COMMONLY LITIGATED CLAIMS

Most cases settle before trial as a result of mediation. To maximize mediation outcomes for wage-and-hour claims, counsel must understand and be prepared to explain the facts and their impact on recovery under applicable wage-and-hour laws. Counsel must also realize what influences others, including the mediator.

Filing wage-and-hour claims

Wage-and-hour claims can be filed in state or federal court. They can be framed as individual actions, class actions, Fair Labor Standards Act (FLSA) collective actions, or representative Private Attorneys General Act (PAGA) actions – and each of those can assert various claims under federal and/or state wage-and-hour laws.

This article focuses on the most common wage-and-hour claim litigated in California – one pending in a California trial court that alleges class and/or representative claims under the California Labor Code and/or one of the Industrial Welfare Commission (IWC) Wage Orders.

Wage-and-hour claims arise from the alleged nonpayment or underpayment of minimum wages and/or overtime compensation, failure to provide required meal and/or rest breaks, failure to provide accurate wage statements (or pay stubs) that comply with Labor Code section 226, failure to pay all wages due at termination of employment and/or failure to reimburse employees for expenses incurred in doing their jobs. They are most often brought by and on behalf of employees that the employer classified as nonexempt, but sometimes are brought by and on behalf of employees who claim to have been misclassified as independent contractors or as exempt from overtime compensation for other reasons.

Originally enacted in 2003, PAGA (Lab. Code, §§ 2698-2699.8) authorizes "aggrieved employees" to file lawsuits to recover civil penalties on behalf of themselves and the state of California for violations of the California Labor Code or an IWC Wage Order. The individual component of a PAGA claim seeks civil penalties based on violations the plaintiff has sustained. (*Adolph v. Uber Tech., Inc.* (2023) 14 Cal.5th 1104, 1119.) A non-individual (or representative) PAGA claim is the component of a PAGA claim that seeks civil penalties based on Labor Code or Wage Order violations sustained by the

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plaintiff and other current and former employees. (*Adolph*, *supra*, at p. 1119.)

Historically, 75% of the amount recovered (net of attorneys' fees, costs, and administrative costs) was owed to the state of California; the remaining 25% was owed to the aggrieved employees. However, in 2024, legislative reforms to PAGA were enacted. Specifically, AB 2288 amended Labor Code section 2699; SB 92 amended Labor Code sections 2699.3 and 2699.5 and added Labor Code section 2699.3. Among other changes discussed in more detail below, the state now receives 65% of the net amount recovered, and the aggrieved employees receive 35%. (Lab. Code, § 2699, subd. (m).)

When should wage-and-hour claims be mediated?

Some lawyers mediate wage-and-hour cases soon after filing. Others wait until depositions have been taken, written discovery has occurred, declarations and/or individual releases have been collected, and class certification and/or summary judgment motions are pending.

Mediating soon after case filing has the advantage of avoiding most litigation costs and resolving the matter while the number of workweeks or PAGA pay periods is at its lowest. However, it also has the disadvantage of attempting to resolve a claim that neither side knows much about.

Exchange information in advance

For any mediation of a class action or PAGA representative action to be successful, the defendant must share relevant information with the plaintiff well in advance of the mediation, allowing the plaintiff and their expert, if any, sufficient time to evaluate it before the mediation. At a minimum, the defendant will need to provide the following:

- The number of workweeks in the class period and/or the number of pay periods in the PAGA period;
- The number of current and former employees in the class and/or PAGA group during the relevant time period;
- Copies of relevant policies and written meal break waivers, if any; and
- A representative sample of time sheets and wage statements during the time period in question.

In addition, the defendant may want to provide other pertinent information, such as the number and locations of time clocks, break rooms, and entrances to the workplace during the relevant period. Also, studies relating to the time it takes to get from the break room(s) to work areas, or to get through a security check or a line to clock in should be made available.

If plaintiff's counsel has difficulty getting necessary information, they should consider involving the mediator to participate in a pre-session or mediation readiness conference sufficiently in advance of the due date for mediation briefs. Defense counsel should understand that a failure to provide the required information in a useful format and timely manner has consequences. A delay could require the mediation to be postponed, with a corresponding increase in the number of workweeks in the class period and/or wage statements in the PAGA period and a likely increase in the amount of any settlement.

The plaintiff must provide the mediator with a damages analysis showing the amounts sought on each claim and the methods used to calculate those amounts. Because of the threat of removal of the case to federal court under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. §§ 1332, subd. (d), 1453 and 1711-1715, most plaintiffs' lawyers do not provide their damages analyses to the defendant but instead permit the mediator to discuss them with the defendant during mediation. It is also uncommon for a defendant to share its damages analysis with the plaintiff or the mediator. Still, the defendant should do its analysis to determine its worst-case exposure if the claims were to be litigated.

Carefully select the mediator

Selecting the mediator is critical, largely because many mediations of class action/PAGA wage-and-hour claims end with a mediator's proposal. Regardless of the selection process, the mediator should have experience with all aspects of wage-and-hour law, including PAGA, class actions, and arbitration. A party should always consider agreeing to a mediator selection proposed by the opposing side, as it is likely that the opponent trusts that mediator. As a result, the mediator will start with immediate credibility in the opposition room.

Consider sharing mediation briefs

Some attorneys still cling to the practice of refusing to exchange briefs in advance of the mediation. But mediation is not like a poker game, where parties hide their cards from one another. In a mediation, "hide the ball" negotiating is likely to be counterproductive. In contrast, a "strong hand" disclosed early in mediation is taken seriously and leads to a better outcome.

Exchanging briefs before the mediation allows an attorney to explain their client's position to the other side. The exchange allows decision-makers to reach a realistic understanding of the risks associated with rejecting a settlement. More importantly, when negotiations begin with an understanding of the strengths and weaknesses of each case – and sharing that with a client in advance of the mediation – allows for a more confident negotiation position.

Exchanging briefs also allows the mediator to begin the mediation session with negotiations immediately without spending time explaining positions. Confidential information can be separately shared with the mediator in a separate brief.

Finally, sharing briefs fosters a collaborative process. Mediation is a time for counsel to set aside their litigator hats and work to help their clients reach a resolution. It is not a time to rattle sabers and pound chests. Nor is it a time to hide information favorable to a client or harmful to the other side's case.

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Information has the power to affect a settlement outcome only when it is shared with the other side.

Show up at mediation prepared to address the facts and the law

At mediation, plaintiff's counsel should be prepared to explain the basis for data-driven claims like those for meal breaks, incomplete or inaccurate wage statements, or failure to pay minimum wages and/or overtime compensation. Knowledge of the following cases is essential:

- *Brinker Restaurant Corp. v. Superior Ct.* (2012) 53 Cal.4th 1004 [employers must "provide" meal breaks and must "authorize and permit" rest breaks, but need not assure that no work is done during breaks];
- *Troester v. Starbucks Corp*. (2018) 5 Cal.5th 829, [California's wage-and-hour laws care for "small things" and, accordingly, unlike the federal wage-and-hour laws, there is no de minimis rule here];
- *See's Candy Shops, Inc. v. Superior Ct.* (2012) 210 Cal.App.4th 889, 907 [employers may use neutral time-rounding practices to calculate work time for payroll purposes];
- *Camp v. Home Depot U.S.A., Inc.* (2022) 84 Cal.App.5th 638, review granted, No. S277518 [employers may not use neutral time-rounding practices to calculate work time for payroll purposes];
- *Donahue v. AMN Servs., LLC* (2021) 11 Cal.5th 58 [employers may not round time punches for employee meal periods; statistical data showing "facial" meal break violations creates a rebuttable presumption of violations];
- *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858 [like overtime compensation, meal and rest break premiums must be paid at a worker's "regular rate of pay," not the base rate of pay];
- *Huerta v. CSI Elec. Contractors* (2024) 15 Cal.5th 908 [time spent on an employer's premises in a personal vehicle at the end of a shift waiting to scan an identification badge, have security guards peer into the vehicle and then exit a security gate is compensable time];
- *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046 ["[A]n employee who is subject to the control of an employer does not have to be working during that time to be compensated under the applicable wage order. Likewise, an employee who is suffered or permitted to work does not have to be under the employer's control to be compensated, provided the employer has or should have knowledge of the employee's work."], citation omitted;
- *Naranjo v. Spectrum Sec. Servs., Inc.* (2024) 15 Cal.5th 1056, 1087 [where an employer reasonably and in good faith believed it was providing a complete and accurate wage statement in compliance with the requirements of Labor Code § 226, it did not knowingly and intentionally fail to comply with the wage statement law].)

Similarly, plaintiff's counsel should be prepared to explain support for evidence-driven claims, such as those based upon off-the-clock activities and/or the employer's alleged failure to provide rest breaks. (See, e.g., *Augustus v. ABM Sec. Servs.* (2017) 2 Cal.5th 257, 265-266, 269 [employees must be relieved of all duty during rest breaks; they cannot be required to respond to calls and must be permitted to leave the premises].) An analysis of the defendant's records relating to late, short and missed meal breaks and meal break premiums paid during the class/PAGA period should support the first category. A summary of anticipated witness testimony, survey results and even witness statements or declarations will bolster the latter category.

The exceptions

Of course, plaintiff's counsel should be aware of exceptions to overtime or rest and meal-break claims based upon the nature of their client's work. (See, generally, https://www.dir.ca.gov/dlse/faq_overtimeexemptions.htm ["Exemptions from the overtime laws"].) For instance, certain interstate truck drivers are exempt from California's overtime compensation and meal and rest-break laws. (See Wage Order 9, subd. 3(L); *Int'l Brotherhood of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin*. (9th Cir. 2021) 986 F.3d 841; see also 49 C.F.R §§ 395.3, 397.5 [requiring certain drivers to remain on duty and with their vehicles].) Likewise, overtime compensation is not always earned by salespeople or employees in the computer-software field. (See, e.g., Wage Order 4, subd. 1(A)(3)(h) [computer software employees], subd. (C) [outside sales employees] and subd. 3(D) [inside sales employees].) And employees covered by collective-bargaining agreements may have limited abilities to bring certain wage-and-hour claims. (Lab. Code § 512, subd. (e); e.g., *Oswald v. Murray Plumbing and Heating Corp*. (2022) 82 Cal.App.5th 938 [collective bargaining agreement waived rights under PAGA].)

PAGA claims

In *Iskanian v. CLS Transp. Los Angeles* (2014) 59 Cal.4th 348, 380, the California Supreme Court held that all PAGA claims are representative claims. As a result, the plaintiff bringing a PAGA claim could not be compelled to arbitration based on an arbitration agreement with the employer because PAGA claims are brought on behalf of the state of California, which never is a party to such an arbitration agreement.

However, in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. __, 142 S. Ct. 1906, the United States Supreme Court disagreed, finding that this holding of *Iskanian* was preempted by the Federal Arbitration Act (9 U.S.C. §§ 1-10) and concluding that PAGA claims can be split into individual and representative claims. As a result, individual PAGA claims are subject to arbitration where an agreement to arbitrate exists between the individual (or named) plaintiff and the employer. The Court also suggested that if the plaintiff loses his or her individual claims at arbitration, the representative PAGA claim would have to be dismissed for lack of standing because the plaintiff no longer could claim to be an "aggrieved

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employee." (See *Rodriguez v. Lawrence Equip., Inc.* (2024) 106 Cal.App.4th 645 [issue preclusion barred employee from relitigating Labor Code violations decided against him in arbitration as he lacked standing as an aggrieved employee].)

It has become the practice of trial courts faced with a representative PAGA claim brought by an individual who had agreed to arbitrate his or her claims to stay the representative PAGA claims while compelling the named plaintiff to arbitrate the individual PAGA claims.

Counsel handling a PAGA case should be thoroughly familiar with the Labor and Workforce Development Agency (LWDA) role throughout the process. Most of the requirements are set forth on the LDWA web page under "PAGA Frequently Asked Questions" (https://www.labor.ca.gov/resources/paga/, as accessed Mar. 31, 2025).

Counsel should also be familiar with the 2024 legislative revisions to PAGA, which apply to civil actions filed (or based on PAGA notices filed) on or after June 19, 2024, including the following:

- Cure provisions, which apply when an employer comes into compliance with certain Labor Code requirements and pays all wages due with 7% interest for the previous three years, as well as liquidated damages and reasonable lodestar attorneys' fees and costs to be determined by the agency or the court. (Lab. Code, § 2699, subd. (d)(1).) Cure can lower the penalty for violations. (*Id.*, § 2699, subd. (j).)
- The "reasonable" steps defense, which applies to an employer who took all reasonable steps to come into compliance, whether before or after receiving a PAGA notice, and can lower or eliminate the penalty for violations. (*Id.*, § 2699, subd. (j).)
- Penalty reductions, based on technical paystub violations or violations that lasted for fewer than 30 days (or four pay periods). (*Id.*, § 2699, subd. (f)(2)(A).) (See also Cal. Dept. of Indus. Rel., "Private Attorneys General Act (PAGA) – Frequently Asked Questions," available at https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act-FAQ.html, as accessed Mar. 31, 2025.)

PAGA reforms may affect standing to bring certain claims. Before the reforms, *Huff v. Securitas Sec. Servs., Inc.* (2018) 23 Cal.App.5th 745 and *Johnson v. Maxim Healthcare Services* (2021) 66 Cal.App.5th 924 held that a PAGA plaintiff did not have to personally experience all of the Labor Code/Wage Order violations alleged in a representative PAGA action. However, this is no longer possible; the 2024 PAGA reforms require that representative PAGA claims be brought by a plaintiff who has *personally* suffered the alleged violations within the one-year statute of limitations prescribed by California Code of Civil Procedure section 340. (Lab. Code, § 2699, subd. (c)(1); see *Williams v. Alacrity Solutions Group, LLC* (2025) 110 Cal.App.5th 932, __, [PAGA action was time-barred where the last Labor Code violation that former employee personally suffered was more than one year before he gave LWDA notice]; compare *Osuna v Spectrum Sec. Servs.* (May 27, 2025) __ Cal.App.5th __, 2025 WL 1501995 [one-year statute does not affect standing for cases filed before June 19, 2024].)

Further, in light of recent judicial decisions and the 2024 PAGA reforms, plaintiff's counsel will need to produce a trial plan for litigating their PAGA claims. Specifically, PAGA reforms codified the holding of *Estrada v. Royalty Carpet Mills* (2024) 15 Cal.5th 582, which held that trial courts may not dismiss representative PAGA actions on grounds that they are not "manageable," but preserved the trial court's discretion to limit the kinds of evidence a plaintiff may present or to use other tools to assure that the representative PAGA claim may be effectively tried. (See Labor Code, § 2699, subd. (p).)

Addressing the situation where multiple PAGA actions have been filed arising from the same alleged Labor Code/Wage Order violations, the California Supreme Court in *Turietta v. Lyft, Inc.* (2024) 16 Cal.5th 664, held that a PAGA plaintiff does not have the right to intervene in and object to another PAGA action involving overlapping claims against the same defendant. Thus, a plaintiff who has received notice from the defendant that other PAGA cases are pending (which generally is required under the California Rules of Court, rule 3.300), or has otherwise learned of another pending or newly filed PAGA case making the same or similar claims, should have a strategy for settlement and court approval in their case. PAGA reforms allow courts to consolidate overlapping cases. (Lab. Code, § 2699, subd. (q).)

Finally, the California Supreme Court will soon resolve an unsettled PAGA issue concerning a "headless" PAGA claim. (*Leeper v. Shipt, Inc.* (2d Dist. 2024) 107 Cal.App.5th 1001, *review granted* No. S289305 (Apr. 16, 2025). In *Leeper*, the court concluded that because the text of the PAGA statute authorizes claims for civil penalties brought by the employee plaintiff "*and* other current or former employees," all PAGA actions necessarily include both individual and representative claims. (*Id.* at p. 1009-1010, citing Labor Code, § 2699, subd. (a), emphasis added). The *Leeper* court concluded that PAGA claimants cannot avoid arbitration of their individual claims by purporting to bring only a "headless" PAGA lawsuit for non-individual claims.

In contrast to *Leeper*, the court in *Rodriguez v. Packers Sanitation Servs. Ltd., LLC* (4th Dist. 2025) 109 Cal.App.5th 69, examining arbitrability of a "headless" PAGA lawsuit where the complaint affirmatively disclaimed any individual claim for relief, concluded that the trial court properly denied a motion to compel arbitration of the named plaintiff's individual PAGA claim. (Cf. *Balderas v. Fresh Start Harvesting, Inc.* (2d Dist. 2024) 101 Cal.App.5th 533 [plaintiff has standing to bring representative PAGA claim without filing an individual PAGA claim].)

With a split in authority, the California Supreme Court is poised to

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address whether (i) every PAGA action necessarily includes both individual and non-individual PAGA claims, regardless of whether the complaint specifically alleges individual claims; and (ii) a plaintiff can choose to bring only a non-individual PAGA action.

Class-action claims

Counsel should be prepared to explain why they believe a class would (or would not) be certified under applicable state or federal law. Under California law, the plaintiff "must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker Restaurant Corp. v. Superior Ct.* (2012) 53 Cal.4th 1004, 1021.)

In *Duran v. U.S. Bank N.A.* (2014) 59 Cal.4th 1, 28, the California Supreme Court confirmed that "the ultimate question for predominance is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. … The granting of class certification thus requires a determination that group, rather than individual issues, predominate."

Class actions can be certified based upon allegedly unlawful policies or practices. (See, e.g., *Brinker, supra*, 53 Cal.4th at p. 1004 [class certification upheld where employer's policy permitted one rest break in every four hours of work instead of in every "major fraction" of four hours]; *Safeway, Inc. v. Superior Ct.* (2015) 238 Cal.App.4th 1138 [certification of meal-break class under the UCL upheld where company's practice was never to pay meal-break premiums].)

Proper documentation and settlement approval

Even where the plaintiff has filed only a representative PAGA case, the defendant may require a release of the underlying violations of the Labor Code/Wage Order. If so, the defendant should advise the plaintiff and the mediator of that desire before the mediation and be willing to provide whatever information the plaintiff needs to mediate the not-yet-filed class claim. Underlying violations can be released only if the matter is treated as a class action, with notice to absent class members and an opportunity to opt out of the settlement.

Also, the plaintiff can support a motion for preliminary approval of the class-action settlement only if he or she can truthfully tell the court, which acts as a fiduciary for absent class members, that the plaintiff has reviewed relevant data for the class period and, based on that review, has formed a good-faith determination that the settlement is fair and adequate.

Not surprisingly, there are tax implications for wage-and-hour settlements. In a pure PAGA case (with no class allegations), recovery is generally taxable and consists entirely of civil penalties, together with attorneys' fees and costs. In a pure wage-and-hour class action (with no PAGA allegations), recovery is generally taxable and can include wages, interest, and statutory penalties, together with attorneys' fees and costs. In settling a class action, parties typically negotiate the allocation between wages, which are reported on a Form W-2, and other damages, which are reported on a Form 1099. For a more complete treatment of tax implications in settling employment cases, see "Tax consideration in settling the case at mediation," by Joseph M. Lovretovich and Jennifer A. Lipski, Advocate magazine (August 2017) at page 72.

As protection against a defendant who, intentionally or not, provided inaccurate information about the number of workweeks and/or PAGA pay periods, the plaintiff who relies entirely on information provided by the defendant about the number of workweeks/PAGA pay periods at issue most likely will insist that the settlement agreement contain an escalator clause. An escalator clause explains that the settlement was based on information supplied by the defendant, and the gross settlement amount may increase if that number differs materially from what the defendant told the plaintiff before or during the mediation. The following is a typical example:

> **Effect of increase in workweeks:** Based on information supplied by the defendant, plaintiffs believe that members of the Settlement Class worked approximately 8,000 workweeks between the start of the Class Period and the date of the mediation (April 1, 2025). If, as of the end of the Class Period, it is determined that the number of workweeks during the Class Period exceeds 8,800 workweeks (8,000, plus 10% of 8,000), then defendant may elect to either (A) end the Class Period on the date on which the number of workweeks reached 8,800 (the "New Class Period End Date"), or (B) increase the Gross Settlement Amount in proportion to the increased percentage – for example, if such increase in workweeks is 15% over 8,000 workweeks, the Gross Settlement Amount will increase by 5%.

Like class-action settlements, which require court approval (see, e.g. *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 129), PAGA settlements must also be approved by a court to ensure they are fair to the affected parties. (*Williams v. Superior Ct.* (2017) 3 Cal.App.5th 531, 549.)

In many instances, courts provide detailed checklists and other resources for the parties when they are preparing motions for settlement approval. Counsel should check a court's website for a Model Class-action settlement agreement and class notice. The version on the Los Angeles Superior Court's website is available at https://www.lacourt.org/forms/pdf/LACIV298.pdf.

Conclusion

To maximize outcomes when mediating wage-and-hour claims, cooperating with opposing counsel is

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essential. First, work with the other side to pick an optimal time for mediation and select an appropriate mediator. Discuss and facilitate a timely exchange of germane information, which is necessary for both sides to analyze the merit of the parties' claims and defenses. Advocate effectively by sharing your mediation brief with the other side. And ensure you understand and are prepared to explain the facts and their impact on recovery under applicable wage-and-hour laws. Finally, work with the other side to properly document and obtain court approval for the settlement.

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