

# PAGA Ruling Unlocks Manageability Defense For Employers

By **Thomas Kaufman and Harrison Thorne** (September 22, 2021)

On Sept. 9, the California Court of Appeal's Second Appellate District handed down an important decision in *Wesson v. Staples The Office Superstore LLC*, which may play a significant role in assisting employers to assert defenses against lawsuits filed under the Private Attorneys General Act.

## Background on the Status of PAGA Before September

PAGA deputizes employees who go through pro forma procedural steps to sue businesses for California Labor Code violations as a proxy for the state. These employees use PAGA as a procedural vehicle to recover civil penalties, 75% of which go to the state.

PAGA actions have become increasingly popular among the plaintiffs bar for two key reasons.

First, attorneys representing PAGA plaintiffs typically receive the equivalent of a third of the gross recovery in attorney fees, before any money is distributed to the state. Second, under the California Supreme Court's 2009 decision in *Arias v. Superior Court*, PAGA actions are not subject to the same procedural requirements as are mandated for a plaintiff to maintain a class action.

As a consequence, PAGA actions can be brought and prosecuted with few protections for employers.

California courts have added additional fuel to the PAGA fire by significantly loosening the standing requirements that are supposed to serve as a threshold to filing PAGA actions. In 2018, the Court of Appeal's Sixth Appellate District held in *Huff v. Securitas Security Services USA Inc.* that an employee can bring a PAGA claim seeking penalties for Labor Code violations he or she did not even experience — so long as the employee experienced at least one Labor Code violation.

Then earlier this year, the Court of Appeal's Fourth Appellate District in *Johnson v. Maxim Healthcare Services Inc.* clarified that the Labor Code violation conferring standing on the employee need not have even occurred within PAGA's one-year statute of limitations period.

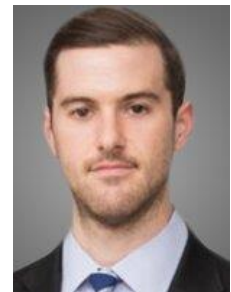
In addition, the California Supreme Court in *Kim v. Reins International California Inc.* held in 2020 that an employee does not lose her standing by releasing her underlying Labor Code claims by private settlement.

In other words, an employee who experienced a violation of Labor Code Section A five years ago could sue a company today, on behalf of herself and other similarly aggrieved employees, to recover penalties for violations of Sections A, B, C and D — even if the employee never experienced violations of Sections B, C or D, and even if she settled her Section A claim and therefore had no basis to recover any personal relief in the lawsuit.

As a result of these decisions, employees who have suffered little or no actual injury can



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initiate PAGA actions that disrupt business operations and sometimes result in massive penalties. In that vein, PAGA litigation has increasingly come to resemble the pre-2004 unfair competition actions that plagued the California business community.

Before 2004, individuals who themselves had suffered no actionable harm had standing to file lawsuits for alleged unfair competition. A state ballot initiative in 2004 created safeguards to ensure that litigants could sue for unfair competition only if they suffered actual injury and their action met the requirements for class certification.

Separately, a line of nonbinding district court decisions over the last few years have chipped away at employers' ability to defend themselves on the merits by calling into doubt whether unmanageable PAGA claims could ever be stricken.

The issue is best illustrated by way of a common example of one type of PAGA claim that can arise: Suppose an employee initiates a PAGA claim, alleging that her employer overloaded a group of 500 employees with work, which caused these employees repeatedly to delay or cut their meal periods short in violation of Labor Code Section 512.

If the case were a class action, the employer might argue that it must be given the opportunity to offer evidence as to each of the 500 employees having had an opportunity to take a compliant meal period on any given day. Such a trial — involving testimony from hundreds of employees, and possibly their managers — would clearly be unmanageable.

Courts presiding over class cases routinely deny class certification in such situations.

But the same is not true across the board for PAGA actions. A line of district court decisions in California and many state trial courts have held that courts are powerless to strike PAGA claims or even limit them in any way to account for unmanageability.[1]

Courts in these cases typically concluded that because PAGA actions are not class actions, but are instead law enforcement actions with the plaintiff acting as proxy for the state — manageability cannot be taken into account because it would interfere with law enforcement.

### **The Wesson Holding**

Wesson, the first published California appellate case to address manageability in the PAGA context, completely rejects the line of cases holding that manageability is only a requirement for class actions, not PAGA cases.

Instead, it properly recognized that manageability is a general due process issue that applies to all actions, whether brought in a private capacity or as an agent of the state. Courts have inherent authority to refuse to allow unmanageable cases to go to trial.

In Wesson, an employee asserted both class claims and derivative PAGA claims on the theory that Staples had uniformly misclassified its store managers as exempt executives, because they allegedly did not meet the requirements for the executive exemption based on the work they performed.

The parties agreed that Staples had consistently classified its store managers as exempt, which meant it did not guarantee them the right to take timely meal periods and paid them a flat salary regardless of whether they worked more than eight hours in a day.

However, Staples argued there was no uniform misclassification because there was wide variation among its stores and in the specific mix of job duties different store managers performed. As a result, the company argued, a class trial would devolve into more than 300 mini trials on whether the exemption applied in that case, such that any sort of collective trial would be "unmanageable."

Agreeing with Staples' assessment, the Superior Court of Los Angeles County denied certification on the class claims. Thereafter, Staples moved to strike the plaintiff's PAGA claim, invoking the court's inherent authority to manage the case.

The plaintiff maintained that the denial of class certification on manageability grounds was irrelevant to PAGA representative actions since proof of manageability was not required to support a PAGA claim.

The trial court disagreed that manageability was irrelevant, but invited the plaintiff to present a trial plan as to how the case could manageably be tried while respecting the defendant's rights to present fully its affirmative defenses. The plaintiff argued that his burden, if any, was limited to establishing that the class members uniformly were treated as exempt, and then it was up to the defendant to figure out how to manageably establish its exemption affirmative defense.

Staples retorted that to assert its defense fully, it would need to present evidence of each of its 150 store's circumstances and each of the 346 managers' particular work styles to establish whether any individual qualified for the executive exemption. The court recognized that such an exercise would take years of court time.

The plaintiff responded that it was immaterial that a trial would take years because PAGA provided no basis to strike a claim on manageability grounds. After determining that the plaintiff had failed to present a workable trial plan, the trial court granted a motion to strike the PAGA claim.

The court of appeal affirmed in full. In so doing, it rejected all of the reasoning that courts had provided previously relied on to hold that manageability is irrelevant to PAGA claims.

The court of appeal held all of the following concerning PAGA and manageability:

- PAGA is a procedural statute that is merely intended to allow individuals to collect civil penalties that the state would otherwise seek in an action based on the employer's violations of the underlying Labor Code statutes.
- For the specific Labor Code claims at issue concerning misclassification of alleged nonexempt employees, the defendant had a potential complete affirmative defense as to any particular manager based on the executive exemption.
- Trial courts have inherent authority not derived from class action procedures to strike claims that would prove unmanageable to try. This authority "arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function."
- Manageability may be a particularly salient issue with PAGA claims because "a PAGA claim can cover disparate groups of employees and involve different kinds of violations raising distinct questions."

- The same manageability issues can arise from an affirmative defense as from an element that is part of the plaintiff's burden to prove.
- The trial court here gave the plaintiff an adequate opportunity to provide a trial plan that would show how a trial could be fairly managed and the plaintiff failed to do so.
- That some PAGA claims may be unmanageable does not mean that they all will be (or even most of them), but rather it depends on each case's specific facts.

## **Implications of Wesson**

Wesson is currently binding precedent. In the absence of conflicting authority or California Supreme Court review, the general rule is that California's trial courts and federal district courts must follow intermediate state appellate decisions where there is no conflict among such appellate decisions.

Thus, unless the California Supreme Court grants review, Wesson will effectively sweep away the line of district court decisions that are inconsistent with Wesson.

In light of Wesson, PAGA defendants should consider taking the following steps:

### ***Determine whether there are manageability issues.***

Employers should carefully assess the plaintiff's burden of proof, and their own affirmative defenses, as to each alleged Labor Code violation asserted in the case.

If proving or disproving liability will require individualized inquiries, excessive witness testimony or other similar issues, there are likely legitimate manageability concerns at play.

For instance, a PAGA claim involving allegations of employee misclassification might require an employee-by-employee inquiry to determine whether liability exists.

### ***Consider whether and when to raise the issue of manageability.***

One vehicle for raising manageability concerns under Wesson is a motion to strike. Although such a motion shares the name with a pleadings motion filed at the outset of a case, this sort of motion to strike differs in that it relies on evidence in the record.

In fact even if manageability issues seem facially apparent from the complaint, judges will be unlikely to grant a motion at the pleadings stage given the focus in the case on the importance of closely analyzing a trial plan to see if it could manage the individual issues.

### ***Request a trial plan.***

Employers should insist — early and often — that PAGA plaintiffs provide a trial plan demonstrating how they can manageably try their case. Employers should further insist, if warranted, that the trial plan accounts for any affirmative defenses the employer might have.

By doing so early, the employer places the onus of manageability on the plaintiff, and primes the court to consider the impact a lengthy trial will have on its docket.

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[1] See, e.g., *Zayers v. Kiewit Infrastructure West*, 2017 WL 7058141 (C.D. Cal. Nov. 9, 2017) (denying motion to strike representative PAGA claims on manageability grounds after denying class certification for the same claims that would potentially involve over 3,000 aggrieved employees); *Tseng v. Nordstrom, Inc.*, 2016 WL 7403288 (C.D. Cal. Dec. 19, 2016)(refusing to recognize manageability defense because it "would impose a barrier on such actions that the state law enforcement agency does not face when it litigates those cases itself.").