Approval of PAGA Settlements: Judicial Perspectives

December 1, 2021
Program: 8:00 – 9:00 AM
Via Zoom Webinar
1 CLE Hour
Approval of PAGA Settlements: Judicial Perspectives

Program Title
Labor & Employment Law

Section/Committee

Wednesday, December 1, 2021 8:00 AM Zoom Webinar

Participant Name

Event Location

State Bar Number

Profession, if not a lawyer

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Judge Hogue was appointed in May 2002 and presently presides in a complex litigation court. She chairs the LASC Media Committee, serves on the Judicial Counsel Advisory Committee on Civil Jury Instructions (CACI), and frequently teaches judicial education courses.

After law school, Judge Hogue joined Lillick & McHose in Los Angeles (later known as Pillsbury Madison & Sutro and Pillsbury Winthrop) and stayed with the firm for 23 years. At the time of her appointment, Judge Hogue was a senior partner representing plaintiffs and defendants in business litigation including media defense, intellectual property, and employment law.

Harvard University Fellowship 1975-76 Kennedy School of Government.
Univ. Cambridge, England, M. Phil. Criminology 1975 (Fulbright Scholarship).
Duke Univ. A.B. 1974 (summa cum laude, Distinction (English), Phi Beta Kappa).
Hon. Rita Miller (Ret.)
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JudgeMillerADR.com

Mediator, Arbitrator, Judicial Referee at ADR Services

Judge Miller mediates and arbitrates a wide variety of cases including business disputes of all kinds, real estate, legal malpractice, medical malpractice, employment, banking, insurance and personal injury. More information is available on her website JudgeMillerADR.com.

Superior Court Assignments
Judge Miller was appointed by Governor Gray Davis in June 2000. For more than 14 years, she presided in an independent calendar general civil courtroom in downtown Los Angeles. Previous judicial assignments have included limited civil jurisdiction, misdemeanors, traffic and Proposition 36 (Drug) Court.

Appellate Court Assignments
Judge Miller served as a justice pro tem of the California Court of Appeal for over one year in 2014 – 2015 and for several months in 2009, hearing argument and issuing opinions as a member of Division One of the Second District Court of Appeal.

Education
Judge Miller graduated first in her class of 375 from Loyola Law School in 1979, summa cum laude with the highest grade-point average in the school’s history at that time.
Judge Miller was the Chief Articles Editor of the Loyola Law Review and published a comment.
Judge Miller earned her B.A. at Connecticut College for Women and also attended Harvard University.

Pre-Judicial Career
Judge Miller joined the downtown Los Angeles firm of Munger, Tolles & Olson as an associate upon graduation from law school and was made a partner after five years. She remained at Munger, Tolles until she was appointed to the bench.
Judge Miller specialized in complex civil litigation and had extensive experience in many areas including legal malpractice, entertainment litigation, insurance coverage, insurance bad faith, commercial disputes, and land use litigation.

Pro Bono and Community Activities
Judge Miller was named Trial Judge of the Year by the Consumer Attorneys Association of Los Angeles for 2012.
She has served as a member of the Association of Business Trial Lawyers Judicial Advisory Committee and the Board of Directors of that association.

Judge Miller is a founding member of the Loyola Law School Civil Justice Program participating from 2004 to present in a wide variety of community service projects and educational symposia. She has participated in its programs including as a speaker/teacher at The Journalist Law School and The 21st Century Law School and moderating various panels. She has spoken and taught at the Consumer Attorneys Association’s Annual Las Vegas Conventions, at the Association of Business Trial Lawyers Annual Symposia and luncheon programs, for the Annual Meeting of the Litigation Section of the State Bar of California, for CEB, for programs of the Los Angeles County Bar and others.

For many years, Judge Miller served as Special Counsel to the Los Angeles County Board of Supervisors assisting the Board by investigating and participating in the publication of semi-annual public reports concerning the Los Angeles County Sheriff’s Department. The work involved evaluation of whether the Sheriff’s Department had implemented reforms designed to achieve gender neutrality in promotions, job assignments, work evaluations, etc. This necessarily also involved review of practices that might discriminate against other groups. The work also included investigation of incidents of sexual harassment and how the Department preformed in addressing these incidents and their root causes.

Judge Miller served for many years as a Hearing Examiner for the Los Angeles Police Department, adjudicating police officer discipline and/or suspension matters and presiding at Police Department license revocation hearings. These hearings involved police misconduct including sexual harassment, improper use of force, utilization of the trappings of office for personal gain, etc.

Judge Miller served for many years as a member of the Board of Directors of Family Assistance Involving the Homeless (F.A.I.T.H.) and participated in administering its programs. This is a group that provides meals to disadvantaged people seven days a week.

She is a member of the Board of Directors of the Cowboy Lawyers Association.

Other publications include scholarly articles written in connection with various teaching activities plus multiple more colloquial articles like A Very Short History Of How The Jury System Created Our Substantive Law And Gave Judges Their Jobs; Why All California Judges Wear A Black Dress To Work, Irrespective Of Gender Or Fashion Preference; Slashings, Shootings, Stabbings, Escapes And Rapes At L.A. Courthouses; What Gang Territory Is Your Courthouse In; and Don’t Drink Coffee Before Getting In The Courthouse Elevator.
Hon. Michelle R. Rosenblatt (Ret.) is a mediator and arbitrator on a wide range of civil disputes with ADR Services, Inc. She is a frequent speaker and panelist for bar associations and continuing education programs.

Judge Rosenblatt retired from the bench in 2016 after 23 years of judicial service, having been appointed to the Los Angeles Municipal Court in 1993 and to the Los Angeles Superior Court in 1996. Judge Rosenblatt was awarded Judge of the Year by the San Fernando Valley Bar Association in 2007 and received the Pearl F. Vogel President’s Award from the Valley Community Legal Foundation in 2016.

On the Los Angeles Superior Court, Judge Rosenblatt presided over the full spectrum of civil cases. Judge Rosenblatt taught judicial education locally and statewide throughout her career on the bench, served as co-chair of the Los Angeles Superior Court Civil Education at Lunch program, as vice-chair of the Superior Court’s Community Outreach, as a participant in the S.H.A.D.E.S. (Stopping Hate and Delinquency by Empowering Students) Program, Teen Court, and as a member of the Superior Court’s Executive Committee. She served as Vice President of the California Judges Association (CJA), Editor of the CJA magazine, The Bench, and President of the California Judges Foundation.

Prior to her appointment to the bench, Judge Rosenblatt served as a deputy district attorney for the County of Los Angeles from 1980 to 1993, where she worked in the Organized Crime and Career Criminal Units, and handled over 200 jury trials. At the beginning of her legal career, Judge Rosenblatt was an associate with the (former) general practice firm of Lowder & White, A Law Corporation from 1978 – 1980, and an associate in the Law Office of Richard G. Sherman (deceased) from 1977 – 1978. She is a graduate of UCLA and Southwestern Law School.
PAGA & PAGA SETTLEMENTS

HON. AMY D. HOGUE,
LOS ANGELES SUPERIOR COURT
HON. RITA MILLER (RET.),
ADR SERVICES, INC.
HON. MICHELLE R. ROSENBLATT (RET.),
ADR SERVICES, INC.
Employee recovers penalties under any Labor Code provision allowing LWDA to collect penalties (subd. (a)).

Employee sues for self and “aggrieved employees” (subd. (c)).

75% to LWDA; 25% to aggrieved employees (subd. (i)).

Prevailing employee wins attorney’s fees and costs (subd. (g)(1)).
Key Cases

- Arias v. Superior Court (2009) 46 Cal.4th 969
- Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348
- Williams v. Sup. Ct. (2017) 3 Cal.5th 531
- Kim v. Reins Int’l California, Inc. (2020) 9 Cal.5th 73
- Wesson v. Staples (2021) 68 Cal.App.5th 746
PAGA: Limited to “Civil Penalties” Available to LWDA

- Usually a flat rate ($100/250) Labor Code 2699(e)(2).
- Not the Labor Code statutory damages (or statutory penalties) available in non-PAGA claims.
  - E.g. § 203 (termination pay) has statutory penalty (not PAGA penalty).
- No compensatory damages like unpaid wages.
- If Labor Code fails to specify amount, default penalties apply (§ 2699(f)).
Plaintiff Sues on behalf of LWDA and Aggrieved Employees

Per *Kim v. Reins*, PAGA claim “is legally and conceptually different from an employee’s own suit.”

Employee suing under PAGA does so as the proxy or agent of the state’s enforcement agencies.

PAGA claim is “a dispute between an employer and the state.”

The civil penalties a PAGA plaintiff may recover on the state’s behalf are distinct from the statutory damages or penalties available to employees suing for individual violations.

Relief under PAGA is designed to benefit the general public, not the party bringing the action.
LWDA Has Right of First Refusal

- Plaintiff sends pre-litigation notice of violations “including the facts and theories to support the alleged violation(s).” (§2699.3(c)(1)(A).)

- Court “shall not” dismiss PAGA claim for “nonmaterial differences in facts or theories” between allegations in letter versus complaint.

- Employer has chance to cure. (§ 2699.3(c)(2)(A).)

- Plaintiff must send LWDA copy of filed complaint (§ 2699(l)(1)) and any proposed settlement or judgment (§ 2699(l)(2)(3)).
Plaintiff notifies LWDA and employer of “specific provision of the code alleged to have been violated, including facts and theories to support the alleged violation.” (§ 2399.3(a)(1)(A).)

No Such Thing as an “Individual” PAGA Claim

▶ “A PAGA representative action is [a] type of qui tam action” conforming to “all traditional criteria, except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the [violation].” (Iskanian at 382.)

▶ California is the “real party.” (Kim v. Reins at 81.)

▶ But Plaintiff can also plead individual claims. (§ 2699(g).)
“Aggrieved Employee”

- Any employee “against whom one or more of the alleged violations was committed.” (§ 2699, subd. (c).)

- Plaintiff suffering single violation has standing to prosecute all violations suffered by “aggrieved employees.”

- Plaintiff can discover contact info for “aggrieved employees” without proof of standing. (Williams v. S. Ct.) (Bel-Aire West procedure.)
Johnson v. Maxim Healthcare Services, Inc. (2021) 66 Cal.App.5th 924

PAGA Plaintiffs are “aggrieved employees” even if their personal claims are time-barred.
No Part of a PAGA Claim Can Be Ordered to Arbitration

- Per Iskanian, “arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy.”

- Rosales v. Uber (2021) 63 Cal.App.5th 937
  - Question whether driver is I/C or employee.
  - UBER wanted to arbitrate whether Plaintiff was “aggrieved.”
  - Can’t split arbitrable “individual” claim from non-arbitrable representative claim. (Citing Williams.)
PAGA Trial Is a Bench Trial

- Private assistance for government action has no counterpart pre-1850 common law courts.
- More like cases tried in equity where juries were unavailable.
- Remedies are equitable (penalties not damages).

Manageability
Store GM filed class and PAGA claims based on misclassification as managerial employees.

Trial court denied class cert.

Defendant moved to strike PAGA as unmanagable.

Trial court invited plaintiff to submit trial plan.

Plaintiff declined -- no obligation to “plan” defense case.

Striking of PAGA claim affirmed.

Court has inherent power to strike PAGA claim as unmanageable.
Unanswered questions

- Who has the burden of prove on issue of manageability?
- What is the standard of proof? (preponderance?)
- How long does a trial have to take to be unmanageable?
PAGA Settlements
Court “Shall Review and Approve” any Settlement

- Court “shall review and approve any settlement of any civil action filed pursuant to this part.” (§ 2699 (1)(2).)

- The “proposed settlement” shall be submitted to LWDA when submitted to court. (Id.)

- For CAL-OSHA violations (6300 et seq.), the court is “to ensure that the settlement provisions are at least as effective as the protections or remedies provided by state and federal law . . .” (§ 2699.3(b)(4).)
Statute Provides No Standard for Court’s Approval of Settlements

- Is it “fair, reasonable and adequate?” (Govt. Code §12652 (qui tam).)

- Is it “fair to those affected?” (Williams at 549.)
“Fair to those affected”

1. LWDA receives 75%; can’t sue for same violations.

2. Plaintiff/Aggrieved Employees receive 25%; can’t file new PAGA.

3. Plaintiff’s counsel receives reasonable fees and costs.

4. Employer pays money to obtain PAGA claim preclusion.
What Can the PAGA Plaintiff Release?

- PAGA rep can’t release aggrieved employees’ claims for violations of Labor Code Sections x, y, z.

- PAGA reps can generally release their individual wage and hour claims.

- PAGA reps can’t release “any and all” claims for penalties “of any kind” because Labor Code has statutory penalties the LWDA is not empowered to recover.

- Suggested language: Plaintiff and the Aggrieved Employees release all claims for statutory penalties that could have been sought by the Labor Commissioner for the violations identified in Plaintiff’s pre-filing letter to the LWDA; Aggrieved Employees retain their rights to pursue claims for wages, statutory penalties and any other damages.”

Reverses as too broad a release of all claims that “in any way relate to” allegations in the Complaint and “potential claims relating in any way to the theories pled.”

Approves release of claims “reasonably related” to the allegations in the Complaint (even for time periods prior to one year preceding pre-litigation letter to LWDA).
“Earmarks of Unfairness”

Dissenting Opinion Starks v. Vortex Inds. Inc. (2020) 268 Cal.Rptr.3d 274 (Depublished)

$675,000 settlement had “earmarks of unfairness.”
- Plaintiff failed to provide information on value of claims (no pay periods or number of employees).
- Starks received $10,000 “service award” vs. $30 per employee.
- Attorneys received $630,000 (no lodestar or fees/costs breakdown).
- $25,000 divided between LWDA and employees (75/25).
Can a PAGA settlement be confidential?
Is the PAGA Plaintiff Entitled to a Service Award?

- Per statute, civil penalties “shall be distributed” to LWDA and aggrieved employees. (§ 2699 subd. (i).)

- “Given the potential for recovery of significant civil penalties if the PAGA claims are successful, as well as attorney fees and costs, plaintiffs have ample financial incentive to pursue . . . representative claims under the PAGA . . . .” (Munoz v. Chipotle Mexican Grill, Inc. (2015) 238 Cal.App.4th 291, 311.)

- “Relief under PAGA is designed primarily to benefit the general public, not the party bringing the representative action.” (Kim v. Reins at 1127.)
How do you structure a combined class and PAGA settlement?

- Aggrieved employees can’t opt out; don’t get notice.
- Separately define class and aggrieved employees.
  - Different groups of employees.
  - Different amounts of money.
  - Different releases.
  - No service award for PAGA rep versus class rep.
Consequences of Settlement for Other Pending Cases.

- Two PAGAs pending: San Diego and Contra Costa.
- When San Diego case settles, Contra Costa Plaintiff “opts out.”
- Contra Costa court sustains employer’s demurrer (claim preclusion).
- **AFFIRMED**: Because San Diego judgment finally resolved LWDA’s claims, Plaintiff can’t pursue civil penalties for same violations on behalf of LWDA.
- Employees can’t “opt out” of PAGA settlements.