Employee Relations
LAW JOURNAL

# *Once in a Lifetime?* Rare Battle Won for Golden State Employers – But the PAGA War Rages On

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*California's highest court has ruled that "underpaid wages" are not recoverable under the Private Attorneys General Act. The decision marks big changes in the Wild West of litigation under the Act, yet many key questions remain unanswered. The authors of this article discuss the decision and its implications.*

The California Supreme Court put an end to a nearly five-year debate regarding the permissible scope of recovery and arbitrability under California's Private Attorneys General Act ("PAGA"), a statute that has left employers in the Golden State scratching their heads for over a decade. California's highest court held that "underpaid wages" are *not* recoverable under PAGA. The decision, *ZB, N.A. v. Superior Court* ("*Lawson*"), marks big changes in the Wild West of PAGA litigation, yet many key questions remain unanswered.

## YOU MAY ASK, WELL, HOW DID I GET HERE?

Ahh, PAGA. Where to begin? For the last 15 years, PAGA has allowed private citizens to step into the shoes of the Labor Commissioner,

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essentially turning "aggrieved" employees into bounty-hunters for the State's Labor and Workforce Development Agency ("LWDA").

Specifically, PAGA litigants are authorized to recover civil penalties on behalf of the State for certain Labor Code violations, which would otherwise be recoverable only by the Labor Commissioner. If successful, employees receive a 25 percent share of civil penalties recovered, with the remaining 75 percent going to the LWDA. And one other thing, PAGA allows for the recovery of attorneys' fees and costs, which are often exponentially larger than the underlying civil penalties and statutory damages recovered—leaving no surprise as to why PAGA has become such a popular vehicle for plaintiffs' attorneys.

Well before PAGA blessed us with its presence, Labor Code section 558 granted the Labor Commissioner – *and only the Labor Commissioner* – authority to issue employers citations comprising: (1) flat rate civil penalties for certain Labor Code violations (anywhere from $50 to $100 per employee per pay period); *and* (2) an amount sufficient to recover "underpaid wages."

By and through PAGA, however, private employees have authority to recover Section 558's civil penalties on behalf of the State, a litigation tactic which has gained significant traction since the California Supreme Court in *Iskanian v. CLS Transp. Los Angeles, LLC*,[1] unanimously held that plaintiffs asserting PAGA claims cannot be compelled to private, individual arbitration. As plaintiffs' attorneys saw it, PAGA allowed them to pursue non-arbitrable representative claims for civil penalties in court *and* recover any underlying "underpaid wages," all with the considerable leverage of recoverable attorneys' fees and costs. Same as it ever was.

In *Lawson,* the plaintiff employee, Kalethia Lawson, filed a PAGA representative action against her employer, ZB, N.A., and sought, among other things, civil penalties and underpaid wages under Section 558. Because Lawson had signed an arbitration agreement mandating the individual arbitration of employment disputes, ZB moved to compel individual arbitration of her claim for underpaid wages under Section 558, arguing that this component is "victim specific," not a civil penalty otherwise subject to *Iskanian's* holding that PAGA claims cannot be compelled to arbitration.

The Court of Appeal denied ZB's motion to compel arbitration, finding that "underpaid wages" under Section 558 are part of an "indivisible civil penalty," i.e., part of a typical PAGA claim, that cannot be compelled to arbitration per *Iskanian,* as stated above.

The California Supreme Court agreed with the Court of Appeal that arbitration is not permissible, but for a surprisingly different reason: employees are not entitled to seek "underpaid wages" *at all* under Section 558, even through PAGA, meaning there is no "victim-specific" claim to compel to arbitration.

In true California Supreme Court fashion, the decision reflects an academic analysis of the legislative history of Section 558 and an in-depth look at the purpose of civil penalties under PAGA. In doing so, the

court found that civil penalties are, at their core, state-imposed penalties designed to punish employers and protect the public, not to benefit or make whole private litigants. That is why, the court noted, 75 percent of civil penalty awards under PAGA are apportioned to the state and only 25 percent to aggrieved employees.

In contrast, compensatory damages, including Section 558's "underpaid wages," *are* by definition designed to benefit individual employees and make them whole. In other words, PAGA's very purpose – to protect the state, enforce the Labor Code, and punish employers who violate its provisions – does not mesh with allowing employees to recover individual underpaid wages through a purely representative action.

## INTO THE BLUE AGAIN, AFTER THE MONEY'S GONE . . .

Since claims for underpaid wages under Section 558 cannot be recovered in a pure PAGA representative action, employees must now avail themselves of other Labor Code provisions to seek unpaid wages and may only resort to those which contain a private right of action. Of course, any such claims could be compelled to individual arbitration if previously agreed to between the parties.

Particularly in the years following *Iskanian*, PAGA has loomed over employers like a dark cloud, carrying the potential to trigger massive penalties and fees, often in amounts grossly disproportionate to any underlying injury. The *Lawson* decision seems to signal the court's willingness to apply PAGA more restrictively. While employers continue to argue that PAGA is unconstitutional as applied, recoverable civil penalties are now at least calculable and defined.

Perhaps this is a hopeful sign for other significant wage and hour cases currently pending before the California Supreme Court, including *Stewart v. San Luis Ambulance, Inc.,* which will decide whether meal period and rest break premiums constitute "wages" for purposes of waiting time penalties and wage statement penalties. Stay tuned. While it is difficult to be optimistic as a California employer, maybe – *just maybe* – there is hope for a more balanced approach for a state which boasts the country's largest economy.

## NOTE

1. 59 Cal. 4th 348 (2014).