M.C.A.C.

Hawaii 2019

PRIVATE ATTORNEYS GENERAL ACT (P.A.G.A.) and Dynamex Operations West, Inc. v. Superior Court OVERVIEW

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State of California Labor and Workforce Development Agency

Secretary: Julie A. Su

- She was appointed, January 2019 by Gov. Gavin Newsom

Agency Oversees:

- Agriculture Labor Relations
- Employment Development Department
- Public Employment Relations Board
- Unemployment Insurance Appeals Board
- **Department Industrial Relations (D.I.R.)/ Labor Commissioner**
- **Division of Workers Compensation**
- **Division of Labor Standards and Enforcement**
- **Division of Occupational Safety and Health (CALOSHA)**
- Employment Training Panel

Reference: https://labor.ca. gov

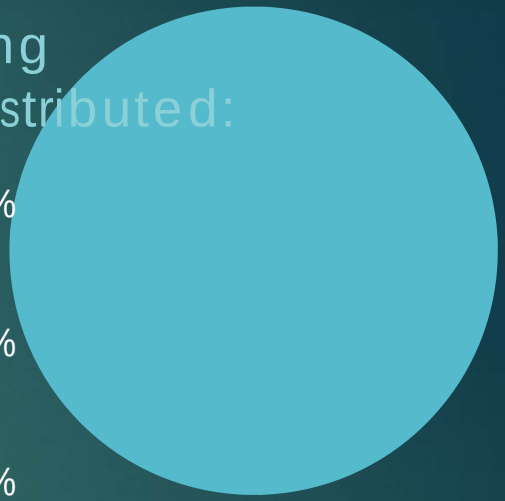
What is the Private Attorneys General Act (P.A.G.A.)?

- PAGA was enacted in 2003 to improve enforcement of labor code violations. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 379 (*Iskanian*).)
- The legislation was a response to two related problems:
  - **(1) many Labor Code provisions were unenforced because they authorized only criminal sanctions and district attorneys tended to target other priorities**, and
  - **(2) understaffed state enforcement agencies often lacked sufficient resources to pursue available civil sanctions**. (*Iskanian*, at p. 379; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 545.)
- Citing the importance of adequate financing of labor law enforcement, declining staffing levels for labor law enforcement agencies, and a growing labor market, the Legislature declared it was "in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, citing Stats. 2003, ch. 906, § 1.)

What is the P.A.G.A. (Cont.)

With regards to the Enforcement Agencies retaining primacy, this is how the settlement amounts are distributed:

- Labor and Workforce Development Agency (LWDA) 50%
- LWDA Education Fund 25%
- Employees 25%



In addition, any Attorney Fees on behalf of the Employees are paid by the Employer!

- Basically, your employees and their would-be attorneys were given a tremendous power by the State of California; although it took them and the rest of the legal community a little while to figure out, today PAGA claims are on the rise.
- PAGA gives employees in California the right to bring a lawsuit against their employers for any violation of the California Labor Code. In short, it allows employees to step into the shoes of an enforcement agency like the Division of Labor Standards Enforcement and recover civil penalties on behalf of the California Labor Workforce Development Agency ("LWDA") for aggrieved employees and their coworkers.
- PAGA lawsuits are not like traditional class action suits where a group of employees come together to seek damages against an employer. Instead, a single employee can initiate, and any other employees that were affected by the same alleged violation are automatically included. Additionally, PAGA lawsuits don't involve damages, but rather penalties. Penalties range from $100 to $200 per employee per pay period during the time of the violation.

P.A.G.A. Settlements

- **Look at, Lopez v. Friant & Associates, LLC.**
  - Plaintiff filed a complaint seeking civil penalties under the Labor Code Private Attorneys General Act (PAGA), Lab. Code, 2698, alleging that his employer, Friant, failed to include the last four digits of its employees' Social Security numbers or employee identification numbers on itemized wage statements, in violation of section 226(a)(7). The trial court granted Friant summary judgment, concluding a plaintiff must do more than show a violation of section 226(a), and must demonstrate that the violation was knowing and intentional. Plaintiff had submitted no evidence to contradict the statement of Friant's accounting manager that she was not aware the last four digits of employees' Social Security numbers were not included on employees' pay stubs. The court declined to address Friant's alternative argument that plaintiff failed to demonstrate he sustained actual injury as a result of the violation. The court of appeal reversed. Consistent with the PAGA statutory framework and the plain language and legislative history of section 226(e), a plaintiff seeking civil penalties under PAGA for a violation of section 226(a) does not have to satisfy the "injury" and "knowing and intentional" requirements of section 226(e)(1).

- PAGA was originally enacted to help the state regulate its underground economy; those businesses that operate unlawfully outside of tax and licensing requirements. Thus, proponents argued that it allowed employees and employee advocates to help the state catch brazen wage violations.

- But PAGA also allows employees to sue for almost every Labor Code violation, not just serious violations or those dealing with health and safety. And that aspect of the law was where the value of PAGA as a litigation tool was eventually recognized by the plaintiff's bar. Here's why a PAGA claim can be so much more harmful to an employer than a regular Labor Code violation or Unfair Business Practices claim.

P.A.G.A. Settlements (Cont.)

In Uber's case, a lawsuit was filed claiming that the Uber drivers were employees, and not the independent contractors that they actually are. This distinction matters because employees in California are guaranteed certain rights, like a minimum wage, meal breaks, rest breaks, and itemized paystubs. The case got nowhere near trial. Instead, after several failed attempts, a California state court approved a $7.75 million settlement of the lawsuit, covering 1.5 million drivers.

A windfall for the drivers? Not so fast. The case document shows that the attorneys took a $2.3 million cut of the settlement, and the state took over $3.6 million. The remaining money was split among the relevant drivers, who took home just $1.08 each — and that's not a typo. Chalk up one for the little guy!

P.A.G.A. Settlements (Cont.)

This is in the words of, Tom Manzo, President of Timely Industries in Pacoima, CA:

Timely Industries in Pacoima opened its doors in 1971, and its employees have always been on equal footing with customers. Imagine my shock when I received a phone call last December informing me that a disgruntled former employee had filed a complaint under the state's Private Attorneys General Act.

Our offense? Providing employees, the flexibility (which they had requested) to take lunch breaks together.

The former employee, who couldn't file a wrongful termination suit, was counseled by his attorneys that the flexibility violated the state's mandatory five-hour lunch break law. The complaint cost our company nearly $1 million – and cost our employees their desired lunchtime flexibility. Apparently, trial attorneys believe the purpose of our state's 1,000-plus-page labor code is to let no good deed go unpunished.

Fortunately, there's a silver lining: Because of our ordeal, I've now connected with dozens of other business owners who have faced similarly frivolous lawsuits. With their support, I've founded a new trade organization called the California Business & Industrial Alliance, which is focused on reforming the PAGA.

It's not a partisan issue. Business owners of all political stripes, and even the United Farm Workers, have been hit with PAGA suits.

California Allows Employees in the Construction Industry to Waive PAGA Remedies Pursuant to Qualifying CBAs

By Bruce Sarchet and Patrick Stokes on November 20, 2018

Among the approximately 1,000 bills signed by California Governor Brown last month was Assembly Bill 1654 ("AB 1654"), which allows a class of employees to waive the remedies created by the Private Attorney General Act of 2004 (PAGA). As the number of PAGA lawsuits continues to increase in California, AB 1654 provides construction industry employers with an opportunity to resolve such disputes through entering into a collective bargaining agreement with a labor union.

PAGA authorizes employees to bring civil actions on behalf of themselves, other aggrieved employees, and the State of California, to collect civil penalties that otherwise would have been assessed and collected by the Labor and Workforce Development Agency (LWDA) for violations of certain provisions of the Labor Code. PAGA requires the employee to follow prescribed procedures before bringing an action. PAGA generally allocates 75% of the civil penalties recovered to the LWDA, for enforcement of labor laws and for education of employers and employees about their rights and responsibilities. The remaining 25% is distributed to the aggrieved employees. A plaintiff prevailing on a PAGA claim may also recover attorneys' fees.[1] The California Supreme Court has unequivocally held PAGA remedies are not waivable by private agreement.[2]

(Cont.)

Echoing the concerns of many California employers that have been subjected to costly PAGA litigation, the bill's author, Assembly member Blanca Rubio, commented:

PAGA was a well-intended law that gives workers the power to fight unscrupulous employers directly through the court system when the Labor Commissioner lacks the resources to enforce but it has, in many cases, become another form of litigation abuse by unscrupulous lawyers… There is a system already in place, for construction trades, Collective Bargaining Agreements (CBA), which can address legal and job site disputes in the construction trade industry.

The Consumer Attorneys of California (CAC) vehemently opposed the bill. CAC claimed the bill would force employees "to rely on their unions—who specialize in collective bargaining and not California law and the rights it affords workers—to enforce their rights under PAGA." CAC also argued the bill is "unconstitutional on its face" under the United States Supreme Court's opinion in *Livadas v. Bradshaw* (1994) 512 U.S. 107.[3] Despite CAC's opposition, a supermajority of the Assembly and Senate voted in favor of the bill, and Governor Brown (who has been known to veto potentially unconstitutional legislation) approved it.

(Cont.)

AB 1654 creates a new section of the labor code[4] providing PAGA remedies are waivable, but only by "an employee in the construction industry" performing work under a CBA that meets specific requirements.

An "employee in the construction industry" is broadly defined to include any employee "performing work associated with construction, including work involving alteration, demolition, building, excavation, renovation, remodeling, maintenance, improvement, repair work, and any other work as described by Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, and other similar or related occupations or trades." The terms "maintenance" and "repair" are particularly broad, potentially covering employees not traditionally considered "construction" workers.

To validly waive an employee's PAGA remedies, the employer must negotiate with a labor union a collective bargaining agreement that meets all of the following requirements:

- Expressly provide for the wages, hours of work, and working conditions of employees;
- Provide for the employee to receive a regular hourly pay rate of not less than 30% more than the state minimum wage rate;
- Mandate premium wage rates for all overtime hours worked;
- Expressly waive the requirements of PAGA in clear and unambiguous terms;[5] and
- Authorize the arbitrator to award any and all remedies otherwise available under the Labor Code, except "the award of penalties under [PAGA] that would be payable to the Labor and Workforce Development Agency."

A waiver of PAGA remedies "expire[s] on the date the collective bargaining agreement expires." Accordingly, in the event the active CBA expires and a new CBA is not already in place, the waiver is no longer valid.

AB 1654 will be automatically repealed on January 1, 2028, and any waiver provisions in effect pursuant to its terms will also expire on that date.

Construction industry employers covered by AB 1654 should consider whether to take advantage of the limited exceptions provided in the new law.

What can you do NOW to mitigate a PAGA claim?

- Consult an Attorney specializing in Labor Law! Have them complete an audit of your Time Card System and Pay Stubs.
- Have your Labor Law Attorney develop an Employment Agreement with an Arbitration Agreement as a part of the document. Address Wage & Hour with a Class Action Waiver
- Have an Employment Practices Liability Insurance policy in place.

What can you do (Cont.)

Understand California Labor Code Requirements

- PAGA lawsuits can apply to basically any violation of the California labor code. There are numerous provisions that apply, but here are listed a few that tend to come up regularly in PAGA lawsuits: failure to provide a half hour lunch break for non-exempt employees, failure to provide regular breaks, improper overtime calculations, paying below the minimum wage, bonuses that weren't properly calculated, not including one of the nine specific pieces of information that must appear on wage statements in California or not providing suitable seating.

Create Compliant Policies

- Once you know the basic requirements that you have as an employer, you need to **create specific policies** that reflect those requirements. Rules and processes will ensure that you, your team and your leadership are all on the same page about what to expect, hopefully helping you avoid any employee issues in the first place.

What can you do (Cont.)

Review Regularly to Be Sure Those Policies are Being Followed

- It's not enough just to have those policies. You also need to uphold and enforce them on a daily basis. If management knows they need to offer lunch breaks to employees within the first five hours of a shift but they fail to do so whenever it gets busy, they're opening you up for lawsuits. Perform regular audits of managers or others in leadership positions to make sure they're following the processes you set out.
- You need to perform a full review and audit of your employee policies regularly, especially when it comes to payroll practices. It's not enough just to have policies. You need to be sure that they're actually followed and put into practice on a daily basis.

What can you do (Cont.)

Keep Detailed Records

- You should already be keeping records of things like payroll and employee timesheets. But because of this type of lawsuit, it's even more important to hold onto that data in case someone does come forward with an alleged violation. If someone says you didn't provide proper breaks during a specific time period but you have time cards that prove employees received them, it could save you a lot of time, stress and money.

Fix Issues Quickly

- When an employee brings forth a PAGA lawsuit, it starts with them notifying the California Labor and Workforce Development Agency and the employer, usually through counsel. When this happens, the employer has 33 days (A.B. 1506 signed, Oct 2nd 2015) to fix the alleged violation before the lawsuit is officially filed. So, if you do find your business in this situation, it's in your best interest to act quickly to fix the situation so you don't end up strapped with large penalties that could cripple your small business.

What is Dynamex v. Superior Court (2018)?

California Supreme Court issued a new "employment" decision that rocked the world of the entire labor community. In the case of *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 83 Cal. Comp. Cases 817, the Court mandated that an "ABC" standard be utilized for determining whether a worker was an "employee" or an "independent contractor" in a **wage order dispute.**

- Essentially, the Supreme Court crafted a new **"ABC standard"** for determining whether a worker is an "employee" or an "independent contractor." If the "ABC standard" determines the worker to be an "independent contractor," then a **California wage order would not apply**.

"Under the *Dynamex* ["ABC"] test, a worker is …**an independent contractor to whom a wage order does not apply** if:

- (A) the worker is **free from the control** and direction of the hirer in connection with the performance of the work…
- (B) the worker performs work that is outside the **usual course of the hiring entity's business**; and
- (C) the worker is customarily engaged in an **independently established trade**, occupation, or business of the same nature as the work performed for the hiring entity."

Will the *Dynamex* "ABC" test Replace the *Borello* factors?

So was this distinction between employees and independent contractors so important, that the Supreme Court intended this new "ABC" standard be applied universally? "Did the Supreme Court intend to replace the *Borello* factors with this new "ABC standard"? These questions have been buzzing around the workers' compensation community for weeks. However, the text of the *Dynamex* opinion **appears to limit the application of the "ABC standard" to "wage order" situations, as follows:**

- "Here we must decide what standard applies, under ***California*** law, in determining whether workers should be classified as employees or as independent contractors *for purposes of* ***California*** **wage orders**, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of ***California*** employees."

The Supreme Court was quick to point out that their analysis in the *Dynamex* case applied specifically to California statutes involving **wage orders**. The Court even stated, "[t]he issue in this ***case*** relates to the resolution of the employee or independent contractor question in one specific context," and that would be the **"wage order"** issue. (emphasis added) However, is it possible that the Supreme Court is sending the legal community a message that a new trend may be developing in this field? Maybe. Maybe not.

Facts in the *Dynamex* case

- Dynamex Corporation is a general delivery service that uses a variety of methods, including individual drivers, to conduct their business. The Supreme Court applied the above "ABC standard" and concluded that the workers in the *Dynamex* case were employees. Initially, the drivers at the *Dynamex* corporation were characterized as employees. Then, abruptly, in 2004, the drivers were re-characterized as independent contractors. As a result, the Supreme Court couldn't help but notice the following:
- "A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order."
- Thus, the Supreme Court began its opinion by acknowledging how important the distinction has become between employees and independent contractors. The Court recognized that there were strong economic incentives that might tempt a business to mischaracterize some workers as independent contractors. The Court then noted that this has become "a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled."

California has, 17 Wage Orders

HTTPS://WWW.DIR.CA.GOV/IWC/WAGEORDERINDUSTRIES.HTM

Borello Factors

The Supreme Court provided an exhaustive analysis of their prior decision in the *Borello* case. Never once did they express an intent to replace that standard with the "ABC" test in workers' compensation cases. In fact, in these three paragraphs below, they seem to infer just the opposite.

- "The particular controversy in *Borello*, *supra*, 48 Cal.3d 341, concerned whether farmworkers hired by a grower to harvest cucumbers under a written "sharefarmer" agreement were independent contractors or employees for purposes of the California workers' compensation statutes.
- "We have acknowledged that the [Workers' Compensation] Act's definition of the employment relationship must be construed *with particular reference to the 'history and fundamental purposes' of the* [Workers' Compensation] *statute*."
- "*Borello* calls for application of a *statutory purpose* standard [the Workers' Compensation Act] that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme [of workers' compensation] at issue."

Borello Factors (Cont.)

The Supreme Court then itemized and extensively discussed the *Borello* factors seemingly in order to consider how best to construct their own "ABC" test to apply in **"wage order"** cases.

"The trial court described the ***Borello* Test** as involving the principal factor of 'whether the person to whom services is rendered has the **right to control** the manner and means of accomplishing the result desired' as well as the following nine additional factors:

(1) right to discharge at will, without cause;

(2) whether the one performing the services is engaged in a distinct occupation or business;

(3) the kind of occupation, with reference to whether in the locality the work is usually done under the direction of the principal or by a specialist without supervision;

(4) the skill required in the particular occupation;

(5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

(6) the length of time for which the services are to be performed;

(7) method of payment, whether by the time or by the job;

(8) whether or not the work is part of the regular business of the principal; and

(9) whether or not the parties believe they are creating the relationship of employer-employee."

Borello Factors (Cont.)

- As the trial court observed, *Borello* explained that "'the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." After the court thoroughly picked apart the elements in *Borello,* they arrived at a new standard that incorporated the main factor in *Borello,* that is, the employer's "right of control" over the worker. This leads one to wonder if this new standard may become a new trend in workers' compensation cases and, if so, would application of the new standard really make all that much of a difference?

Conclusion

There has been much discussion lately about the applicability of the *Dynamex* case to workers' compensation issues. Although the *Dynamex* case is instructive in showing the community the trend that the higher courts are following, the language by the Supreme Court does not appear as if it was intended to be applied in the workers' compensation setting.

However, as the saying goes, the "trend is your friend." It is incumbent upon all practitioners to study the language in *Dynamex* and assess how the Court arrived at its decision. It may provide a forecast for what lies ahead in this area.

How does Dynamex affect you the Contractor?

- First and foremost: Always check with your Labor Law Professional! (Attorney)
- No real changes under Construction to Field Operations

However, A large Sub-Contract Agreement, I.E., Concrete or Steel? Then your Sub-Contract Agreement needs to address: Wage Order Issues and Indemnify you if their employees make a claim against you.

- Do you use Independent Contractors in your office? I.E.
  - Estimators?
  - Detailers?
  - Clerical?
- Remember, Dynamex is in regards to "Wage Orders"
  - Minimum Wage
  - Overtime
  - Meal & Rest Periods etc…
- Most likely, during the Third Quarter of 2019 you'll see additional cases addressing the clarification of the Dynamex "A. B. C. Test"