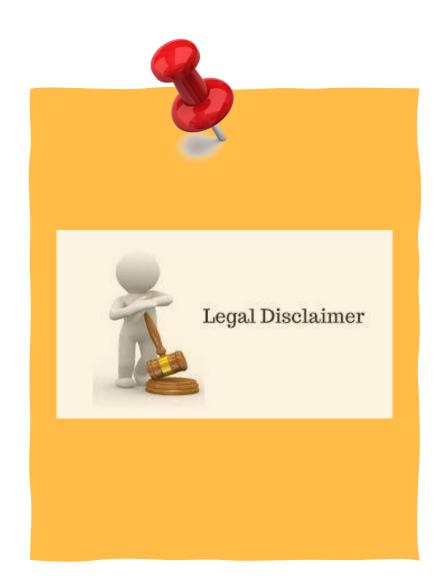


Arbitration Agreements, PAGA, Lawsuits: Avoiding Legal Landmines

Presented by: Erica L. Rosasco, Esq. and Seth G. Mehrten, Esq.

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The Private Attorneys General Act of 2004 (PAGA) AKA SUE YOUR BOSS LAW



PAGA Background PAGA was enacted to enable employees as private attorneys general to enforce the California Labor Law while labor-law enforcement agencies are able to retain primacy over enforcement efforts.

PAGA enables an aggrieved employee to initiate an action against a former employer on behalf of himself or herself and other current or former employees to obtain civil penalties that previously could have been recovered only by the State by the Labor and Workforce Development Agency (LWDA).

In a successful PAGA action, the LWDA is entitled to 75% of the award and the remaining 25% is distributed among the employees affected by the violations at issue.

California State PAGA Case Details as of 2021

Lawsuits

23,675 notices (2016 – 2020)

526 average days per case

\$1,118,777 average settlement

\$368,520 average amount to attorneys

\$8,114 average amount to plaintiff

\$1,256 average amount to employees where data is available

56 court cases

343 average days per case

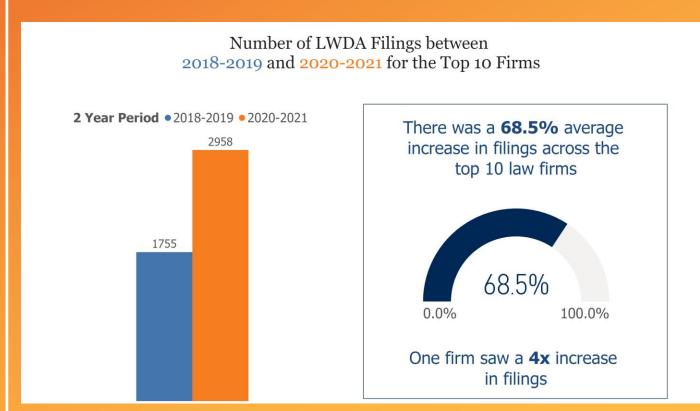
\$789,936 average settlement

\$5,941 average amount to employee based on LWDA information dated 7/7/2021

Plaintiff refers to the original employee or employees who filed the PAGA complaint. The "average amount to employees" reflects the amount other employees received.

Determinations made to issue citation, refer case to the LWDA DIR Bureau of Field Enforcement unit, and/or close the case.

Source: National Law Review January 12, 2023 Volume XIII, Number 12



Top PAGA Filers of 2022

Firm	No. of PAGA Filings
AEGIS LAW PROTECTING YOUR RIGHTS	319
MOON & YANG	253
HAWKINS CLASS ACTION ATTOMPTS	210
BIBIYAN LAW GROUP, R.C.	195
LAWYERS FOR JUSTICE	157
LAVI & EBRAHIMIAN, LLP	146
WILSHIRE LAW FIRM	132
BIBD Blumenthal Nordrehaug Bhowmik De Blouw LLP	131
MESSRELIAN LAW ATTORNEYS AT LAW	130
JUSTICE LAW CORPORATION	100

Recent Class Action/PAGA Allegations in Ag

Not providing enough shade for all of your workers to take their meal/rest periods

Walking time in/out of a field cutting into 30-minute meal period

Failing to pay weighted average overtime

Not paying travel time and mileage for field changes during the day

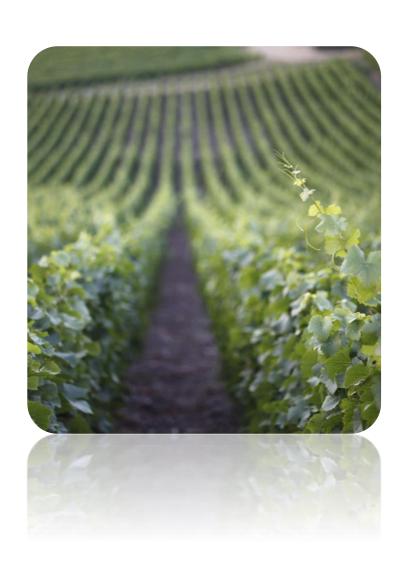
Lack of suitable seating for jobs that can be done while seated

Not paying for pruning shears, rain gear and boots

Requiring workers to arrive to work 15 minutes before the start of their shift

Requiring employees to remain on the property during meal or rest periods





Joint Employers – Who's Responsible for a Class Action or PAGA Lawsuit?

- Grower?
- Farm labor contractor?
- Vineyard manager?
- Supervisor(s)?
- Individual owners?

Cal. Lab. 2810.3 Joint **Employer** Liability Statute

- (A) A client employer shall share with a labor contractor all civil legal responsibility and civil liability for all workers supplied by that labor contractor for both of the following:
 - (1) The payment of wages.
 - (2) Failure to secure valid workers' compensation coverage as required by Section 3700.
- **(B)** A client employer shall not shift to the labor contractor any legal duties or liabilities under Division 5 (commencing with Section 6300) with respect to workers supplied by the labor contractor.
- **(C)** At least 30 days prior to filing a civil action against a client employer for violations covered by this section, a worker or the worker's representative shall notify the client employer of violations under subdivision (b).
- Don't forget about common law liability!



Labor Code § 558 – Making Individuals Liable

- Now heavily used to make individuals liable in wage and hour cases.
- Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of the labor code or any provision regulating hours and days of work in any order of the wage orders shall be subject to civil penalties.
- Citations from the Labor Commissioner can be to any "person" that has paid or caused to be paid a wage for overtime work in violation of the labor code, or any provision regulating hours and days of work in the wage orders or any overtime law.

If this happens to me, I'll just file bankruptcy!



- Is it that easy?
- How might the case continue to follow you?
- What if the state comes after you?



What is the penalty?

Your Company's legal name is "Wonderful Winery, Inc."

On your paystubs, your company name is listed as "Wonderful Winery."

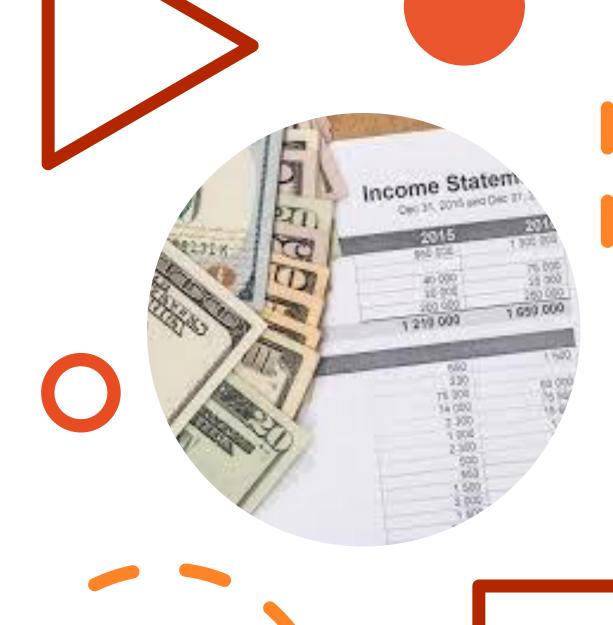
Your business runs biweekly payroll (every two weeks) and issues wage statements listing the incorrect legal name or business address to 20 employees for one year.

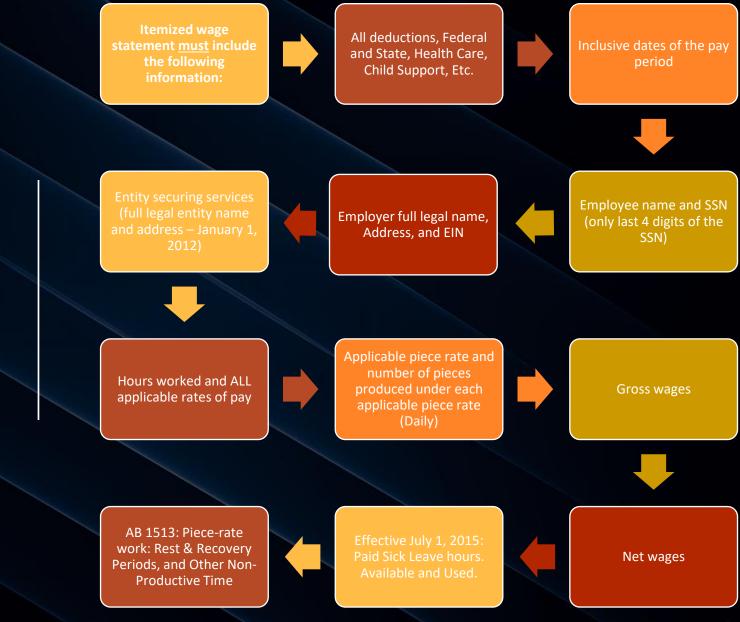
One employee sues, on her own behalf, and on behalf of the 19 other employees.



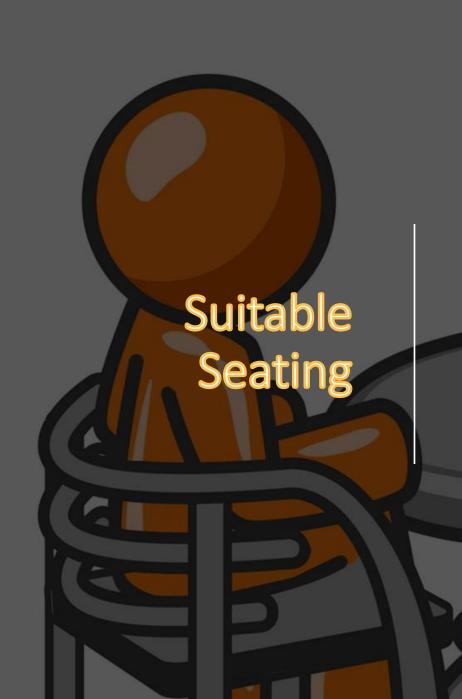
PAGA Penalties Add Up

- Incorrect entity name or address and/or inaccurate pay period dates = LC 226 penalty of \$50 for the first pay period and \$100 for every subsequent pay period per employee (up to a maximum of \$4,000 per employee).
- PAGA = additional \$100 penalty per employee per pay period.
- On her own behalf, the suing employee can seek statutory penalties in the amount of \$50 for the initial pay period and \$100 for each of the remaining 25 pay periods (total of \$2,550). She can ALSO seek civil penalties under PAGA in the amount of \$100 for each of the 26 pay periods (total of \$2,600). Thus, the employee can seek a total of \$5,150 on her own behalf.
- The suing employee can seek PAGA penalties in the amount of \$100 for each of the 26 pay periods (the same \$2,600 figure as above) on behalf of each of the 19 other employees. For these 19 employees, the total penalty is \$49,400 (19 x \$2,600)!
- The total penalty exposure is **\$54,550** (\$5,150 + \$49,400) because your legal business name or address was wrong on your paystub.
- Consider the penalties if you have 100 employees (don't forget about employee turnover).
- Plus, your attorney's fees and the plaintiff's attorney's fees.





Pay Check Stubs – LC 226



- ➤ Under California wages orders, all employees must be provided with "suitable seats when the nature of the work reasonably permits a seat."
- Even when the nature of the work requires standing, an adequate number of seats must be "placed in reasonable proximity to the work area," and employees must be allowed to use those seats at times when it doesn't interfere with their job duties.
- Employers should consider whether seating should be provided for use while the employee is:
 - Performing work.
 - While employees are idle.



How to Avoid a PAGA Lawsuit?

- Audit your practices often.
- Send your supervisors for training.
 - Conduct field audits too.
- Don't expect your payroll person to know HR!

Arbitration Agreement



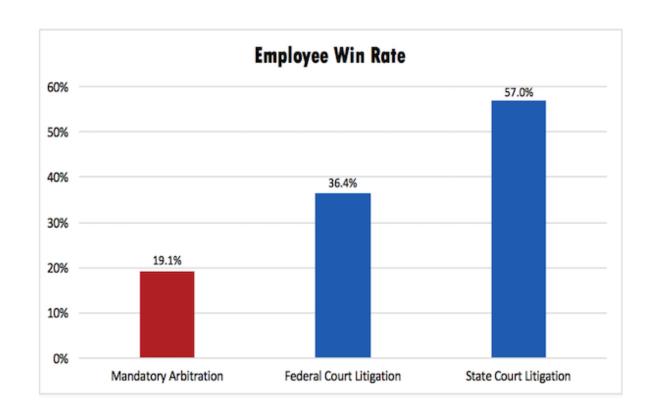
Pro 🙂

- More employer friendly
- Quicker resolution
- Less expensive for attorney's fees because it is quicker and more limited on discovery/motions
- More confidential than a trial
- Easier access to a judge during discovery disputes
- Class action waiver
- Parties get some choice in the arbitrator

Con 🕽

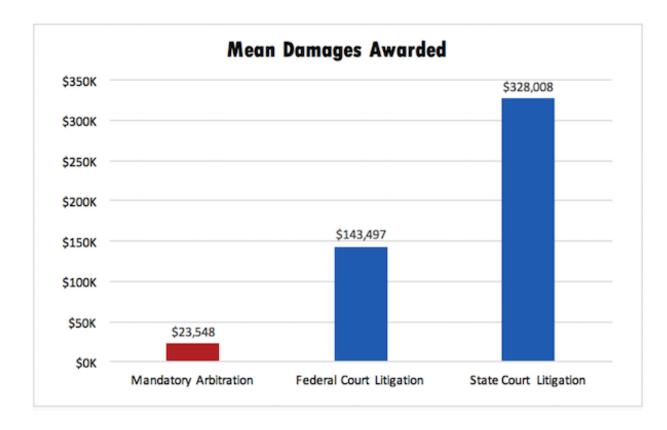


- Very expensive! Deposit request of at least \$50-60k upfront. Around \$5k is nonrefundable.
- Less discovery / motions available
- More informal rules of evidence
- Arbitrator is less likely to drop the hammer; might split the baby
- No jury; putting all your eggs in one basket
- Very limited rights to appeal
- Risk of mass arbitration



Source: Economic
Policy
Institute (2015)

Source: Economic
Policy
Institute (2015)



Viking River Cruises, Inc. v. Moriana

The U.S. Supreme Court reversed and remanded.

Moriana alleged that she was not preempted from remaining as the PAGA representative for the PAGA class action although she no longer held any individual claims.

The U.S. Supreme Court agreed.

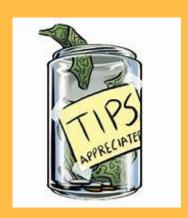


Post-Viking Rivers' Holding Impact on Employers

- An employee does not need to have any individual claims to represent a non-individual PAGA class action.
- The Court's decision has the potential to increase liability substantially for employers depending on which county the case is filed until the Supreme Court of California or the California Legislature clarifies the issue.



Tips to Introducing an Arbitration Agreement



- Can't be forced to sign
- Don't lie about what it means
- Provide a copy in English/Spanish
- Can't tell them if they don't sign they won't have a job
- Signing must be voluntary, without duress or coercion
- Offer to provide arbitration rules
- Give opportunity to review before signing
- H2A employees can sign in Mexico
- Employee can still pursue claims at any agency ALRB, EEOC, CRD, WCAB, EDD
- Not limited on damages or attorney's fees that employee could receive
- Waives right to jury trial
- Don't pressure into signing
- Don't refuse to explain what employee is signing
- Encourage employee with limited education to seek outside review of agreement before signing



A Clue You Are About to Get Sued...

A request for payroll and personnel records from a current or former employee.



David D. Bibiyan

1801 Century Park East, Suite 2600 Las Angeles, California 90067 310.438.5555 T 310.300.1705 F david@tomprowlaw.com

www.emplaymentlawyerla.com

April 17, 2019

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: Record Request for
Dear Sir or Madam:
Please be advised that this office has been retained to represent the interests of in connection with her potential civil claims against and arising out of her employment therewith. For your convenience and records, we have enclosed an Authorization for Release of Confidential Information executed by our client.
Please allow this letter to also serve as a reconfirmation of your obligation to preserve any and all evidentiary items relating to semployment. It is therefore imperative that you and your companies take affirmative steps to preserve these items, as the failure to do s may constitute negligent or intentional spoliation of evidence. As such, any malfeasance on the part of your companies with regard to this issue will prompt this office to seek all applicable and appropriate evidentiary, issue, and/or terminating sanctions.
Accordingly, demand is hereby made that you advise this office of where the aforementioned evidentiary items are presently located. You are also to provide this office, to the extent that you are aware, with the name, address, and telephone number of each and every individual, organization and/or entity that may be in possession of such items and/or any other evidence relating to the providence r
Pursuant to California Labor Code section 432, in addition, you are to provide this office with a copy of each and every document signed by our client that relates to her employment with the companies. Moreover, pursuant to California Labor Code sections 236, 432, 1174 and

Pursuant to California Labor Code section 432, in addition, you are to provide this office with a copy of each and every document signed by our client that relates to her employment with your companies. Moreover, pursuant to California Labor Code sections 226, 432, 1174 and 1198.5, this letter will serve as a demand for copies of our client's time records, payroll records, the entirety of her personnel file, and all documents signed by our client to obtain or maintain employment. With respect to the payroll records, please be advised that Labor Code section 226 requires an employer to provide such records within 21 days of the date of this request.



MELMED LAW GROUP

WRITER'S EMAIL ADDRESS

1180 S BEVERLY DRIVE, SUITE 610 Los Angeles, California 90035

T. (310) 824 - 3828 F. (310) 862 - 6851

	(6.0) 002
	April 23, 2019
VIA US	MAIL
Re: I	Request for Personnel File of
Dear Sir	r or Madam:
On beha	who we represent, we are requesting that you provide us
with cop	pies of any and all documents relating to the obtaining and holding of the employment of
	at including, but not limited to:
• (2	A complete copy of spersonnel records (Labor Code §1198.5);
(All itemized wage statements (<i>Labor Code</i> § 226(b)-(c), for the applicable IWC Wage Order, §7(B)) and time records showing when began and ended each work period (for the applicable IWC Wage Order, §7(A)(3));
• 1	When a piece rate or incentive plan was in operation, records of piece rates and an explanation of the incentive formula (for the applicable IWC Wage Order, § 7(A)(6));
• /	All records identifying total hours worked in each payroll period and applicable rates of pay (for the applicable IWC Wage Order, § 7(A)(5));
• /	All meal and/or rest break records (for the applicable IWC Wage Order, § 7(A)(3));
t	All-time records showing when began and ended each work period, as well as time records identifying his meal periods, split shift intervals, and total daily hours worked (for the applicable IWC Wage Order, § 7(C));
	of all agreements signed by staining or holding of semployment (Labor Code § 432).

Robin Hall (323) 430-8160 telephone (direct) records@lfecr.com

4100 West Alameda Avenue, Third Floor, Burbank, California 91505 (323) 430-8160 telephone (general) | (323) 306-5571 facsimile www.LawyersForEmployeeAndConsumerRights.com

October 5, 2021

VIA FIRST CLASS MAIL



Subject:

Dear

Our firm represents regarding certain potential workplace related claims. Our client requests, by way of this letter and the attached authorization, copies of the personnel file, hiring paperwork, write-ups, performance evaluations, payroll records and wage statements. Please take note that daily time records going back three years are 'payroll records and wage statements,' as Labor Code section 1198.5, 226(c), 432 and the Industrial Welfare Commission Wage Orders spell out that employees have a right to inspect clock-in/clock-out records. Enclosed is a signed Authorization for Release of Personnel File and Wage Records, empowering our firm to receive these documents.

I also request that you sign and return the enclosed Tolling Agreement, which will prevent any potential settlement negotiations from ending prematurely. Otherwise, the need to meet a statute of limitations deadline could frustrate a mutually beneficial settlement and cause each side to incur unnecessary costs. Executing the Tolling Agreement does not constitute an admission of liability. Rather, this is merely a tool to ensure any possible settlement is fully explored prior to litigation.

Additionally, please set forth the basis for any contention that our client's disputes must be referred to arbitration. Specifically, please identify any written contracts or agreements that you contend constitute an agreement to arbitrate. If you contend that our client is bound by any arbitration agreement, please inform us

Re: October 5, 2021 Page 2 of 2

within 21 days of this letter. If you fail to do so, we will presume that you are waiving your right to arbitrate any employment dispute with our client.

Finally, you are obligated to preserve both electronic and tangible documents as well as any other tangible items reasonably related to potential claims, including all electronically stored information that is relevant or reasonably likely to lead to the discovery of relevant evidence. This preservation obligation arises as soon as an entity or individual learns of potential claims against it, and continues until the litigation is resolved. The preservation obligation encompasses the duty to stop any routine data or document deletion that could result in the destruction of discoverable evidence. See Advisory Committee Notes to FRCP 37 (2006 Amendment). This includes interdicting any internal procedures that are likely to make discoverable evidence unduly difficult to obtain, such as archiving to an off-site location. Id. Any failure to do so would constitute spoliation of evidence, which may result in significant monetary and evidentiary sanctions. Unigard Security Insurance Company v. Lakewood Engineering & Manufacturing Corp., 982 F.2d 363 (9th Cir. 1992); accord Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

Sincerely,

/s/ Robin Hall //

Copy to:

Encl: Authorization for Release of Personnel File and Wage Records, Tolling Agreement



Seth Mehrten 1141 W Shaw Ave #104 Fresno, CA 93711 559.248.2360

smehrten@theemployerslawfirm.com

www.theemployerslawfirm.com

QUESTIONS?



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Erica L. Rosasco, Esq.
6540 Lonetree Blvd., Suite 100
Rocklin, CA 95765
916.672.6552

erica@Rosascolawgroup.com

www.Rosascolawgroup.com