

## In This Issue:

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The California Supreme Court has held that an “aggrieved” employee can bring a representative action on behalf of other employees for civil penalties under the California Private Attorneys General Act (PAGA) without first having the action certified as a class. Nevertheless, because the court has not defined what is meant by a “representative action,” many questions about PAGA actions are left unanswered.

## CLASS ACTION LITE?: The California Supreme Court Allows PAGA Wage and Hour Actions to Proceed as Representative Actions

By Richard H. Rahm and Christopher E. Cobey

In *Arias v. Superior Court (Angelo Dairy)*<sup>1</sup> (2009) the California Supreme Court held that an “aggrieved employee” may bring an action for civil penalties on behalf of other employees in a representative action pursuant to the California Labor Code Private Attorneys General Act of 2004 (PAGA) without complying with California class action procedure. Unfortunately, the court in *Arias* did not elaborate on the nature of a PAGA representative action, leaving open questions of how PAGA representative actions can be tried or settled. Without such guidance, California employers may expect to see plaintiffs bringing more PAGA representative actions, either by themselves or as companions to class actions, in which they argue that such class action due process safeguards as “typicality” or “predominance” are no longer relevant.

### The Court of Appeal Decision

In *Arias*, a former employee brought a number of wage-and-hour claims alleging violations of the California Labor Code against his former employer, Angelo Dairy, either on behalf of himself or as an uncertified representative action on behalf of himself and current and former employees under the PAGA and the Unfair Competition Law (UCL).<sup>2</sup> The trial court granted the employer’s motion to strike the two representative action claims on the ground that the plaintiff had failed to comply with the California pleading requirements for class actions. In a reported 2007 decision appealing this ruling, the court of appeal reversed the trial court’s ruling with respect to the PAGA claim, holding that the plaintiff could bring a PAGA representative action without complying with class action procedural requirements. The court of appeal based its decision on four reasons: (1) the language of the PAGA plainly states that, “[n]otwithstanding any other provision of law,” an aggrieved employee may bring a PAGA action on behalf of himself or herself “and other current and former employees”; (2) similar language that was used in the PAGA was previously held to allow an uncertified representative action under the pre-Proposition 64 UCL; (3) unlike the current UCL, there is nothing in the PAGA that expressly requires certification of a class action; and (4) “a private plaintiff suing under this act is essentially bringing a law enforcement action designed to protect the public.”

## The Supreme Court Decision

In its decision, the California Supreme Court adopted the court of appeal's reasons and ruled unanimously that a plaintiff seeking relief under the PAGA on behalf of other employees, although he or she could bring such claims as a class action, was not required to do so.<sup>3</sup> In so holding, the court rejected the employer's arguments that the court of appeal's decision concerning the PAGA would lead to absurd results, was not consistent with PAGA's legislative history, and would result in a denial of due process to employers.

With respect to the due process argument, the Supreme Court provided its first real analysis of the PAGA. The employer argued that an uncertified representative action would allow unfair "one-way intervention" by employees, *i.e.*, even if the employer obtained a decision in its favor, because collateral estoppel applies only to parties in the previous lawsuit, an employer in subsequent PAGA actions could be bound by an adverse determination of common issues in a preceding lawsuit, while none of the employees would be similarly bound by prior determinations in the *employer's* favor. Noting that collateral estoppel binds not just the parties to an action but those for whom the parties acted as proxies, the court rejected the employer's argument. The court held that when an "aggrieved employee" sues under the PAGA, he or she "does so as the proxy or agent of the state's labor law enforcement agencies," and thus "represents the same legal right and interest as state labor law enforcement agencies – namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency." The court further held that a PAGA action is "fundamentally a law enforcement action designed to protect the public and not to benefit private parties", and so "with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment..." Indeed, in the companion case to *Arias*, the Supreme Court even drew the additional conclusion that the PAGA "does not create property rights or any other substantive rights," and "the right to recover a statutory penalty may not be assigned."<sup>4</sup>

Nevertheless, the California Supreme Court recognized that, if a plaintiff succeeded on its prior claims, it could also trigger an employee's entitlement to Labor Code remedies in addition to civil penalties, such as the additional hour of pay for an employer's failure to provide an authorized meal or rest break. The Supreme Court dismissed such a concern because the "potential for non-party aggrieved employees to benefit from a favorable judgment under [the PAGA] without being bound by an adverse judgment ... is not unique" to the PAGA, concluding that this "potential impact on remedies other than civil penalties is ancillary to [PAGA's] primary objective", and thus "the one-way operation of collateral estoppel in this limited situation does not violate the employer's right to due process of law."

## The Consequences of *Arias* for California Employers

***Uncertified Representative Action.*** Although the Supreme Court held that a PAGA representative action need not be certified, it did not discuss what procedure was applicable to a PAGA representative action. Some may argue that the Supreme Court's decision means that any employee, provided they can demonstrate they are "aggrieved," may represent all employees without concern as to whether the plaintiff's claims are "typical" of other employees, or whether liability for such claims can be determined on a class-wide basis. Yet, there is no "generic" representative action under California statutory law, and each representative action is governed by the statute that creates it. In this respect, the PAGA provides that the only employees who can recover civil penalties are "aggrieved employees," *i.e.*, those who have had their Labor Code rights violated, and they can recover those penalties only for those specific pay periods in which their rights were violated. For claims where an action (or inaction) by an employer is tantamount to liability, *e.g.*, where an employer has never provided wage statements, a PAGA representative action will look very similar to a class action insofar as the "aggrieved employees" will be "all employees," and the pay periods in which they are aggrieved will be "all pay periods." Less clear, however, will be PAGA representative actions where liability must be determined on an employee-by-employee basis, as could be the case with an overtime claim based on alleged misclassification. In such a situation, there will be a genuine question as to which employees the "aggrieved employee" may represent without a court making a determination of whether he or she is typical of other employees or whether liability could be adjudicated [on a class-wide basis][for all plaintiffs collectively].

***Settlement of Unasserted PAGA Claims.*** In *Deleon v. Verizon*,<sup>5</sup> a California court of appeal held that PAGA actions were not brought

on behalf of the state but expressly on behalf of the “aggrieved employee” and “other current or former employees.” The *Deleon* court accordingly held that employees in a class action, in which no PAGA claims had been alleged, could nonetheless waive any rights to PAGA civil penalties, thus preventing a subsequent PAGA action purportedly on behalf of the same employees. Because the Supreme Court granted review of *Deleon*, to be held until it decided *Arias*, it is unclear what, if anything, is left of the *Deleon* decision. For instance, if an employee has no right to a civil penalty under the PAGA, and thus has no right to assign it, does he or she have such a right to waive enforcement of such a right in a settlement, particularly if the state is not a part of the settlement, and the primary purpose of a PAGA action is “enforcement” of the Labor Code?

## What Should California Employers Do in Response to *Arias*?

More than ever, California employers should audit their compliance with the state’s demanding Labor Code and other wage-and-hour requirements, at least with respect to the most common wage-and-hour claims, such as (1) properly classifying employees as overtime-exempt or nonexempt; (2) providing eligible employees with all entitled meal and rest breaks, within the time required, and without interruption; (3) providing all legally required information on wage statements; (4) recording of, and payment for, all hours of overtime worked; and (5) reimbursing all work expenses incurred. As discussed above, an employer will now have a far more difficult time to defend against a PAGA representative action where liability is based on an employer’s action as opposed to liability based on an individual assessment of an employee’s actions.

With respect to the settlement of wage-and-hour class actions where no PAGA claims have been asserted, an employer should consider following the PAGA administrative procedures by amending the complaint to state a PAGA cause of action, and that any settlement of PAGA penalties be approved by the court.

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<sup>1</sup> 46 Cal. 4th 969, 95 Cal. Rptr. 3d 588 (2009).

<sup>2</sup> See Cal. Bus. & Prof. Code §§ 17200 *et seq.*

<sup>3</sup> In a ruling helpful to employers, the *Arias* Court also ruled that, because of a 2004 amendment of the UCL by initiative, UCL claims must be brought pursuant to class action procedures. Similarly, in the companion case to *Arias*, *Amalgamated Transit Union, Local 1756 AFL-CIO v. Superior Court (First Transit, Inc.)*, 95 Cal. Rptr. 3d 605 (2009), the Supreme Court also held that neither a UCL claim nor a PAGA claim could be assigned to another person, in this case, to a union.

<sup>4</sup> See *Amalgamated Transit Union*, 95 Cal. Rptr. 3d 605.

<sup>5</sup> 170 Cal. App. 4th 519 (2009), rev. granted. See Littler ASAP “*Bounty Hunters*” Lose Their State “*Badge*” as California Court of Appeal Clarifies Several PAGA Issues (Feb. 2009).