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LABOR AND EMPLOYMENT ALERT

August 2009

## Only the Injured Are Left Standing

*By Ivan B. Perkins and Steven M. Schneider*

Two California laws have created litigation migraines for employers: the Unfair Competition Law[1] ("UCL") and the Private Attorneys General Act[2] ("PAGA"). But in two recent companion cases, the California Supreme Court has just provided some relief by clarifying and restricting who can bring UCL and PAGA claims.[3] The answer is refreshingly straightforward: plaintiffs must be *actually injured*. This means that labor unions and other membership groups cannot bring UCL or PAGA claims on behalf of their members unless the union or group itself has been harmed.

The broadly drafted UCL allows people to bring suit against "any unlawful, unfair or fraudulent business act or practice." Before 2004, anyone could bring a UCL claim, including a noninjured person acting on behalf of the general public. However, in 2004, California voters passed Prop. 64, which restricted access to the courts under the UCL. It provided that private plaintiffs (i.e., not state agencies) who represent the interests of others must have "suffered injury in fact."

The PAGA permits an "aggrieved employee" to file suit on his or her own behalf, as well as on behalf of other employees, to recover civil penalties for Labor Code violations. It defines an "aggrieved employee" as an employee "against whom one or more of the alleged violations was committed."

Fortunately, the California Supreme Court read those restrictions at face value. In *Amalgamated Transit Union*, the Court concluded that both laws "require a plaintiff to have suffered injury resulting from an unlawful action." The Court also blocked the union's attempted end-runs around this standing-to-sue requirement. First, the union claimed that its members had *assigned* their own rights under the statutes to the union. The Court concluded that claim assignment would nullify Prop. 64, and held that rights under PAGA may not be assigned. Second, the union claimed "associational standing," a concept borrowed from federal standing doctrine. The Court also rejected this theory, reiterating the plain language of the UCL and the PAGA.

In *Arias*, the Court further narrowed the range of litigation by insisting that private representative actions under the UCL must also satisfy class action requirements. This, too, was a product of


**Q: WHAT IS THE PAGA, WHY WAS IT PASSED, AND WHAT IS IT SUPPOSED TO ACCOMPLISH?**

A: THE GOAL WAS TO ENSURE COMPLIANCE WITH THE LABOR CODE IN AN ERA OF DWINDLING STATE ENFORCEMENT RESOURCES. WHILE THE NUMBER OF EMPLOYERS AND EMPLOYEES IN CALIFORNIA MORE THAN DOUBLED BETWEEN 1970 AND 2003, STAFF AT THE DEPARTMENT OF INDUSTRIAL RELATIONS (INCLUDING THE DIVISION OF LABOR STANDARDS ENFORCEMENT (DLSE) AND CAL-OSHA) HAS BEEN ON A DOWNWARD TRAJECTORY. FOR EXAMPLE, THE DLSE HAS TARGETED THE RESTAURANT INDUSTRY FOR INSPECTION, BUT ONLY INSPECTED 981 RESTAURANTS IN 1998-99. AT THAT RATE, IT WOULD TAKE 100 YEARS TO INSPECT EACH ONE.[6] TO ADDRESS THE PROBLEMS OF UNDER-STAFFING AND UNDER-ENFORCEMENT, THE LEGISLATURE PASSED THE PAGA, EFFECTIVELY DEPUTIZING MILLIONS OF POTENTIAL LABOR LAW ENFORCERS. PAGA NOT ONLY AUTHORIZED LAWSUITS, BUT ALSO CREATED CIVIL PENALTIES FOR A VARIETY OF LABOR CODE VIOLATIONS THAT HAD PREVIOUSLY

Prop 64. Technically, Prop 64 only required compliance with Section 382 of the Code of Civil Procedure, a provision commonly interpreted to allow class actions. Based on official Prop. 64 election literature, the Court determined that the voters meant to impose class action requirements.

The Court rejected a similar claim for private representative claims under PAGA, but in a manner that might help employers. The employer in *Arias* mounted a strong due process argument that PAGA representative claims should meet class action requirements. Otherwise, employers are caught in a one-way "issue preclusion" trap, which works like this. An employee brings suit, claiming penalties for Labor Code violations, and loses. When another employee brings the same claim, the employer cannot seek refuge in the first judgment, because employee #2 was not a party in case #1. So the employer has to keep relitigating the issue, again and again. Finally, one employee wins. Now, because the employer was a party in that case, the issue is precluded, and all future plaintiffs prevail on that issue. In other words, "[o]ne plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success."[4] [5]

The Court acknowledged this constitutional problem, but solved it by holding that judgments *against* PAGA plaintiffs who sought Labor Code penalties would actually bind future employees and government agencies. In other words, issue preclusion under PAGA is now at least partially a two-way street. If an employer wins the first time around on a claim for penalties, it can use that judgment to block future claims for those penalties.

Unfortunately, the Court narrowed the "issue preclusion trap" only for claims seeking Labor Code penalties. That "trap" is still alive and well concerning the non-penalty remedies for wage and hour violations, such as back pay for unpaid minimum wage or overtime, and the one hour's additional pay for a missed meal or rest period. A claim for penalties requires proof of a Labor Code violation, and some violations have remedies in addition to civil penalties, such as back pay. As the Court noted:

> "Therefore, if an employee plaintiff prevails in an action for civil penalties by proving that the employer committed a Labor Code violation, the defendant employer will be bound by the resulting judgment. Nonparty employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations. If the employer had prevailed, however, the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties."

Consequently, plaintiffs must incur actual injury under both statutes,

IMPOSED ONLY CRIMINAL SANCTIONS. PLAINTIFFS NOW CAN COLLECT 25% OF THOSE CIVIL PENALTIES, WITH 75% GOING TO THE STATE.

**Q: HOW DOES THE UCL WORK? WHAT IS REQUIRED TO BRING A UCL CLAIM?**

A: PLAINTIFFS CAN SUE DEFENDANTS FOR COMMITTING BUSINESS ACTS OR PRACTICES THAT ARE: (1) UNLAWFUL, (2) UNFAIR (USUALLY MEANING ANTITRUST VIOLATIONS), OR (3) FRAUDULENT. AS THE CALIFORNIA SUPREME COURT PUT IT, THE UCL "'BORROWS' VIOLATIONS OF OTHER LAWS," MAKES THEM "INDEPENDENTLY ACTIONABLE" AND "SUBJECT TO THE DISTINCT REMEDIES PROVIDED THEREUNDER."[7] THESE REMEDIES INCLUDE INJUNCTIONS, RESTITUTION, AND CIVIL PENALTIES.

and representative cases under the UCL (but not PAGA) must meet class action requirements. Employers can use favorable PAGA judgments for Labor Code penalties against future claimants, but might still be caught in an "issue preclusion trap" concerning non-penalty remedies for Labor Code violations.

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[1] Labor Code Section 2698, et seq.

[2] Business and Professions Code Section 17200, et seq.

[3] *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (First Transit, Inc.)*, No. S151615 (Cal. Supreme Court June 29, 2009); *Arias v. Superior Court (Angelo Dairy)*, No. S155965 (Cal. Supreme Court June 29, 2009).

[4] *Arias*, slip op. at 15 (quoting Fireside Bank v. Superior Court, 40 Cal. 4th 1069, 1080 (2007)).

[5] *Arias*, slop op. at 18.

[6] Note, "Businesses Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code," 35 McGeorge L. Rev. 581, 581-582 (2004).

[7] *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992).

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