

# CALIFORNIA

## EMPLOYMENT LAW LETTER

### PAGA CLAIMS

## Mistakes in wage statements can cost employers under PAGA

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*In an unfavorable opinion for California employers, a California Court of Appeal recently ruled that (1) employees seeking damages in an action arising under Section 226(a) of the Private Attorneys General Act of 2004 (PAGA) needn't sustain any injury to bring the action, (2) the employer's violations need not be "knowing and intentional" to subject it to liability, and (3) the fact that the violations were mere errors is no excuse. Instead, the court expressly distinguished the requirements for obtaining "civil" versus "statutory" penalties, explaining that employees may recover civil penalties under the PAGA to benefit the general public without experiencing an injury.*

### **Accidental paycheck errors result in big penalties**

On April 1, 2015, Eduardo Lopez sued his employer, Friant & Associates, LLC, a furniture manufacturer based in Oakland, under the PAGA, Labor Code Section 2698, *et seq.* Lopez alleged that Friant failed to include the last four digits of its employees' Social Security numbers (SSNs) on certain itemized wage statements in violation of Labor Code Section 226(a), which states in relevant part: "An employer, semimonthly or at the time of each payment of wages, shall furnish . . . an accurate itemized statement in writing showing . . . the name of the employee and only the last four digits of his or her [SSN]."

Friant hit back, arguing that Lopez failed to satisfy Labor Code Section 226(e)(1), the provision of Section 226 that addresses damages and requires that the employer's "knowing and intentional" omissions give rise to an "injury." Specifically, Friant argued that Lopez offered no evidence to rebut testimony from his manager that she was wholly unaware that the last four digits of employees' SSNs weren't included on the itemized wage statements. Friant asked the court to throw out Lopez's PAGA claim in a motion for summary judgment, arguing that he suffered no injury as a result of any "knowing or intentional violations" it perpetrated.

In a clear victory for the employer, the trial court sided with Friant and granted the motion for summary

judgment. According to the court, Lopez was required to establish more than a simple violation of the statute: He "must show not only a violation of section 226(a), but [also that] the violation was 'knowing and intentional.'"

### ***Some PAGA claims require no injury***

On appeal, the 1st Appellate District reversed the trial court's decision, instead agreeing with Lopez's arguments that he wasn't required to show a "knowing or intentional" violation *or even an injury* to prevail on his PAGA claims. While the court noted that the "statutory test is clear," it went on to offer a lengthy 16-page opinion justifying its ruling.

Pointing to the legislative intent behind the PAGA, the court explained: "[The] PAGA is a type of *qui tam* statute that allows an aggrieved employee to recover *civil penalties* on behalf of the state. . . . The purpose of [the] PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the labor code."

Following a discussion of the extensive revisions to the law since it was enacted, the court pointed to a series of amendments that redefined when and how employees could recover money under Labor Code Section 226. Namely, the term "injury" was redefined in Section 226(e) to permit an employee to receive damages for his employer's knowing and intentional failure to comply with itemized wage statement requirements, but the legislature also defined "remedies" as more expansive in scope, encompassing (1) damages, penalties, attorneys' fees, and costs available under Section 226(e), (2) injunctive relief, attorneys' fees, and costs under Section 226, and (3) *civil penalties for violations of Section 226(a)* (i.e., the itemized wage statement requirements).

### ***Splitting hairs: civil vs. statutory penalties***

In essence, the court distinguished between recovery of statutory damages (actual individual damages) under Section 226(e) and civil penalties (obtained for the state) under Section 226(a)'s itemized wage statement requirements. The court explained that it drew the distinction because Section 226(e) damages have long been, and continue to be, "one for recovery of individual damages," giving rise to the need to establish a personal injury to sustain them as articulated in the statute. By contrast, civil penalties are obtained to "benefit the general public rather than the party bringing the action."

Because Lopez didn't seek recovery under Section 226(e), he didn't need to prove he sustained an "injury" as a result of knowing or intentional violations by the employer. Instead, by seeking only civil penalties under PAGA Section 226(a) for improper wage statements, he could sustain his PAGA claim without meeting the higher Section 226(e) standard.

## ***Confusion over civil penalties remains***

While affirmatively stating that Lopez's civil penalties didn't fall under Section 226(e), the court declined to state which civil penalty in the Labor Code his claim actually falls under. Lopez argued that he was entitled to civil penalties pursuant to Labor Code Section 2699(f) because Section 226(a) doesn't provide for civil penalties. Section 2699(f) generally establishes a civil penalty for "all provisions of this code [including the PAGA] except those for which a civil penalty is specifically provided."

Friant disagreed, arguing that Section 226.3 provides a civil penalty for violations of Section 226(a), but only when an employer fails to provide wage deduction statements or comply with the wage statement requirements in Section 226(a). The court noted that federal courts are split on the issue and punted it back to the lower court for further consideration.

## ***Ignorance is no excuse***

The court also squarely rejected Friant's counterarguments on appeal. First, the court rejected Friant's argument that it may, and should, exercise its discretion to reduce a PAGA award that is "unjust, arbitrary and oppressive, or confiscatory" under Labor Code Section 2699(e)(2) because the noncompliant wage statements were inadvertent rather than knowing and intentional. The appellate court explained that "such decisions . . . are for the trial court in the first instance when determining the amount of a PAGA award."

Second, the court held that Lopez's claim, which arises solely under Section 226(a), was not unsustainable as "derivative, or dependent on" Section 226(e) because he never asserted a claim under Section 226(e). And finally, it held that his stand-alone Section 226(a) action didn't circumvent the PAGA's statutory requirements and intent, unfairly opening employers up to Section 226(e) actions down the line, because Section 226(e) requires an "injury" as well as a "knowing and intentional" showing that the employer violated the PAGA. *Lopez v. Friant & Associates, LLC* (California Court of Appeal, 1st Appellate District, 9/26/17).

## ***Bottom line***

Friant admitted during the course of the litigation that it had issued Lopez and other employees 5,776 wage statements that didn't comply with Labor Code Section 226(a)(7). If Lopez succeeds on his claim, penalties could be assessed at \$200 per violation following the initial violation, resulting in a sizable civil penalty. If he succeeds, he would also be awarded attorneys' fees under Labor Code Section 2699(g)(1). So seize the day, review your wage statements for compliance with California law, and, if necessary, consult an experienced employment attorney. Your pocket book may thank you one day.

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