

What is “Class Action” and “PAGA”

Class Action:

- One employee sues on behalf of all of your non-exempt employees
- Collectively alleged underpayment of wages, penalties, interest, attorney fees
- Much of the remedy is back wages

PAGA Lawsuit:

- Private Attorney General Act
- One employee sues on behalf of the State of California
- Collectively alleges violations of Labor Code Sections
- Seeks per employee, per workweek civil penalties payable to California and employees.

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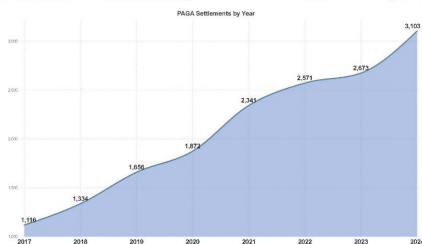
Arbitration Agreements

- Properly worded arbitration agreements **can stop class action lawsuits.**
- They might not stop PAGA claims
- Arbitration is really expensive, but so is going to trial in front of a jury.
- Consider the pros and cons!



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PAGA Settlements by Year: 2017-2024



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PAGA Reform = Reasons to Comply

What does the amended law allow?

Reduced penalties if employer does:

- Training
- Audits
- Cure errors



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Reduce or Eliminate Penalties

Private Attorneys General Act of 2004,
Labor Code §§ 2698 – 2699.8.

Training, Audits, and Cures

- Employers that take all reasonable steps reduce penalties by 85% if before notice or by 70% if after notice. LC § 2699(g), (h).
- No penalties if the employer takes all reasonable steps and cures the violation. LC § 2699(i).
- Penalties can be further reduced (below the 15% and 30% caps) if they would be unjust, oppressive, or confiscatory. LC § 2699(j)

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What Are PAGA Lawsuits Most Often About?

Claim	Common Theories	Can You Train, Audit, And/or Cure?
Unpaid wages	<ul style="list-style-type: none"> • I worked off-the-clock. • I worked pre-shift or post-shift due to required security checks, donning/doffing, tool maintenance, training, etc. • I worked during meals + breaks. • My work time was rounded for pay purposes. • I was owed reporting time wages, but did not receive them or they were paid at the incorrect rate. • I had to work two shifts per day and was not paid a split-shift premium. • I was on controlled standby but did not receive pay. 	✓
Unpaid overtime	<ul style="list-style-type: none"> • All claims in unpaid wages above. • Overtime was not paid at regular rate. • I was misclassified as exempt from overtime. 	✓
Meal Breaks and Rest Periods	<ul style="list-style-type: none"> • I work during my meals and rest breaks. • Work demands cause my breaks to be late. • My meals and rest breaks are interrupted by work demands. • I did not waive meals on shifts lasting 5-6 or 10-12 hours. • My employer rounds time for purposes of determining whether I had a compliant meal. • My employer pays premiums at the incorrect rate of pay. • I was misclassified as exempt from overtime and did not receive the opportunity to take breaks. 	✓

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What Are PAGA Lawsuits Most Often About?

Claim	Common Theories	Can You Train, Audit, Audit/Correct?
Wage Statements	<ul style="list-style-type: none"> My wage statement is missing required information, like no pay period start or end date. The wage statement's employer name and address listing is wrong. The total hours worked listing is incorrect since it includes non-worked time. The failure to pay me for all hours and/or premiums causes my wage statements to be inaccurate. 	✓
Sick Pay, Vacation Pay, PTO	<ul style="list-style-type: none"> My employer's policy causes an illegal forfeiture of accrued vacation time. PTO sick or vacation are paid at the incorrect rate of pay. Off-the-clock work is not factored into my sick pay or vacation accrual. Wage statements do not list the sick pay balance like it's supposed to. I don't accrue sick pay at the rate required by law. 	✓
Expense Reimbursement	<ul style="list-style-type: none"> I had to take work-related calls on my personal cell phone and did not get reimbursed. My employer required me to use a mobileApp on my personal phone for work, and I did not get reimbursed. My employer reimburses me for internet usage, but not enough. I did not receive mileage at a high enough rate per mile. My employer required me to wear particular clothes or shoes to work that constitute a uniform and did not provide those clothes or shoes. 	✓
Failure to Timely Pay Wages	<ul style="list-style-type: none"> My employer did not maintain regular paydays. My employer paid me my final wages late. The failure to pay me for all hours and/or premiums resulted in a failure to timely pay me for all wages during employment and termination. 	✓

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Training



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Is Employee Training Required?









- Technically, no.
- Unlike sexual harassment and workplace violence, you are not required to do wage-and-hour training.
- But training is helpful to:
 - Lessen employee confusion;
 - Increase employee compliance; and
 - Improve defenses against class and PAGA claims.

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What Are Key Subjects For Training?

-  Appropriate use of timekeeping systems.
-  Accurately recording all time; no off-the-clock work.
-  Meal period and rest break rules.
-  Appropriate use of meal/rest period attestations.
-  [Optional] Expense reimbursement expectations.
-  Depending on your business, other topics may be important to cover



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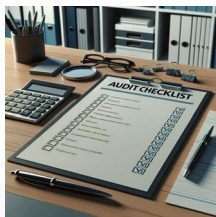
Who Should Attend The Training?

-  Hourly employees.
-  Managers of hourly employees.
-  Personnel who control payroll for CA employees



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Audits



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Rounding Time Entries

What is rounding?

- A time entry is rounded to the nearest 5 minutes, 1/10th of an hour, or quarter hour.

Is it legal?

- Technically yes, so long as on average the rounding doesn't deprive the employee of pay.



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Rounding Time Entries

What is the problem?

- Rounding can skew in favor of the employer.
- For example, workers may often punch in 5 minutes early but rarely 5 minutes late.
- Litigation of this issue can be expensive and PAGA claims are common.
- Note: Rounding meal period punches is **not allowed**.



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Rounding Time Entries

Solutions

Don't Do It.

- Consider not rounding time entries.
- Definitely don't round meal punches.

Or Do It Right.


- If you do round, consider combining with a "grace period" policy that allows some clock in/out flexibility.
- Check the data for skewing



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Regular Rate of Pay



What is the "regular rate"?

- Overtime is paid at 1.5x or 2.0x the regular rate
- Meal and rest period premiums, and sick pay, are paid at the regular rate
- When calculating, must include most forms of non-discretionary pay, such as bonuses, commissions, shift differentials, etc.



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Regular Rate of Pay

What is the problem?

- Erroneously excluding some kinds of pay will result in payment at the incorrect rate.

Example: Employee works 45 hours, is paid \$20 base rate of pay and earns a \$200 production bonus. 5 hours of overtime are paid at \$32.22 per overtime hour.

- Overtime rate (1.5x) on base pay is \$30 and on bonus is \$2.22 $(200/45) \times 0.5 = 2.22$





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Regular Rate of Pay


Solution

- Include all required forms of pay in the regular rate calculation. (See regular rate chart.)
- Note special rule for "flat sum bonus"
- Remember that meal and rest premiums also paid at regular rate.
- Consider conducting an audit and retro pay if done incorrectly in the past.



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Sick Pay
Common sick pay mistakes:
Improper accrual rates
Must meet minimum standard of at least 24 hours/year or 1 hour per 30 worked.
Higher in some CA cities or counties
Miscalculated pay out rate
Must pay non-exempts at the regular rate for the work week or use a 90 day lookback.




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Sick Pay

Common sick pay mistakes:

- Balance not provided each pay day
 - Must be put on pay stub or other document provided to employee each pay day.
- Attendance points
 - Employees should not receive attendance points or other discipline if they properly use accrued sick pay.




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Meal and Rest Breaks

The Basics:

- 30 minute off duty meal break to start before the end of fifth hour of shift; second meal break for shifts over 10 hours.
- 10 minute off duty rest break for every 4 hour shift segment, or major fraction thereof.



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Meal and Rest Breaks

Common Meal Break Problems

- Written policy is defective/incomplete
- Meal punches missing or rounded
- Auto-deductions
- Late, short or skipped (with no premium paid)
- Not allowed to leave
- Working while clocked out
- Premium paid at wrong rate



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Meal and Rest Breaks

Common Rest Break Problems

- Written policy is defective/incomplete
- Late, short or skipped (with no premium paid)
- Not allowed to leave
- Too busy
- Supervisors interfere / discourage (or don't encourage)
- Working while on break
- Premium paid at wrong rate



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Meal and Rest Breaks

Good Practices


- Write an excellent policy
- Train staff and managers (a lot)
- Pay premiums, at correct rate, and display on pay stub
- Use attestations to document when/why improper meal/rest breaks
- Hold slackers accountable (supervisors and staff alike)




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Off The Clock Errors



- Compensable time
All hours worked must be paid time
- Common Mistakes
 - Missing small amounts of time before or after clocking
 - E.g. closing down, locking doors, arming the alarm
 - E.g. waiting in a security line
 - Errands before or after shift
 - Paying on a commission or piece rate basis, but not paying for non-productive time
 - Working during breaks
 - After hours emails, texts, calls when not clocked in





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Off The Clock Errors

Good practices

- Strong policy instructing employees to clock all hours and never work off clock
- Evaluate whether any off clock work occurs
- Provide a mechanism for capture pre- or post- shift work performed
- Limit off shift work
- Require employees to verify they have clocked all hours
- Ensure breaks are not interrupted



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Expenses

Expense Reimbursement

- Labor Code 2802 requires all expenses be reimbursed.

Common Mistakes

- Failure to reimburse for incidental mileage
- Out of pocket expenses for supplies
- Tools
- Cell phone, internet, other work from home expenses



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Expenses



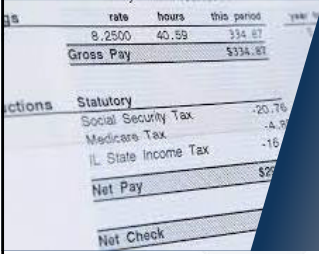
Good Practices

- Expense reimbursement policy
- Provide all necessary tools, equipment, supplies
- Mileage logs and reimbursement forms
- Either prohibit cell phone use for work, or pay for it
- Determine whether employee incurs any other WFH expenses

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Wage Statements



Good Practices

- Expense reimbursement policy
- Provide all necessary tools, equipment, supplies
- Mileage logs and reimbursement forms
- Either prohibit cell phone use for work, or pay for it
- Determine whether employee incurs any other WFH expenses

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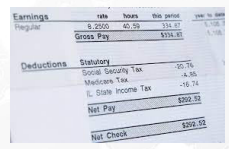
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Wage Statements

Labor Code 226

- Gross and net wages
- Total hours worked
- All hourly rates in effect and corresponding hours
- Piece rate if applicable
- Inclusive dates of pay period
- Legal name of employer and address
- Employee name and ID #
- Deductions

Also: Sick pay accrual



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Wage Statements

Common Mistakes

- Incorrect business name / address
- Missing pay rates, especially overtime
- Sick pay hours missing
- Statements lost / unavailable due to change in payroll vendor (3 year requirement)

Earnings	rate	hours	this period	year to date
Regular	\$ 20.00	40.00	\$ 800.00	\$ 7,100.00
Gross Pay			\$ 800.00	
Deductions				
Statutory				
Social Security Tax			-20.75	
Medicare Tax			-4.80	
FL State Income Tax			-16.74	
Net Pay			\$ 657.71	
Net Check			\$ 657.71	

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Exempt Classification



White Collar Exemptions
Executive
Administrative
Professional
Also:
Inside/outside sales

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Exempt Classification

Common Mistakes

- Salary too low: \$68,640 minimum
- Not paid on a "salary basis"
- Duties of executive, administrative or professional exemptions not performed more than 50% of the time
- Outside salespersons are not spending more than 50% working time "outside" (especially during pandemic)



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Thank you!

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The firm has more than 900 attorneys located in 54 offices across the United States and in Europe, Canada, and Mexico.

We represent a diverse range of clients, from small businesses to Fortune 50 companies.



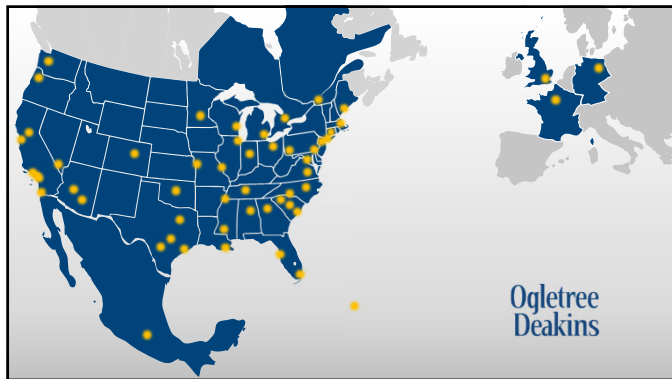
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