

# The Private Attorneys' General Act ("PAGA")

## A Defensive Primer and Best Practices

# Presented by

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# What Is PAGA?

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## 1. The California Private Attorney Generals Act

- i. “Deputizes” private citizens to sue employers for labor code violations on behalf of the state; and
- ii. Can sue on behalf of self and/or other “aggrieved” employees.

## 2. Procedure and Class Waivers

- i. Employee sends written notice to employer and state agency;
- ii. Agency can either (1) decided to investigate, (2) decide not to investigate, (3) do nothing; but
- iii. After 65 days, “aggrieved” employee can bring “representative action”
- iv. Class waivers are (presently) ineffective, but that may change when the Supreme Court decides three consolidated cases, *National Labor Relations Board v. Murphy Oil USA, Inc.*, *Epic Systems Corp. v. Lewis*, and *Ernst & Young LLP v. Morris*, oral arguments for which occurred on Oct. 2, 2017.

## 3. Penalties

- i. “Initial violation”= \$100 per pay period and “Subsequent violations” = \$200 per pay period (Courts agree that an employer must have some sort of notice before the 2x penalty for “subsequent violations” applies, but what constitutes notice is unclear.
- ii. Penalties go back one year
- iii. 75% percent to state and 25% to “aggrieved employees”

## 4. PAGA Suit “Opens the Books” state-wide

- i. *Williams v. Superior Court (July 13, 2017)* – mere allegations that (1) violations occurred, (2) plaintiff aggrieved, (3) employer has statewide policy sufficient to justify state wide discovery of employee contact information.

# The Inaccurate Paystub: A Quiz

## Cal. Lab. Code § 226(a)

- (1) Gross wages earned;
- (2) Total hours worked (except salaried exempt employees);
- (3) Piece rate units and rate, if applicable;
- (4) All deductions, including taxes, disability insurance, and health and welfare payments (deductions ordered by the employee may be aggregated and shown as one item);
- (5) Net wages earned;
- (6) The inclusive dates of the pay period;
- (7) The name of the employee along with his or her social security number (last four digits only) or an employee identification number;
- (8) The name and address of the legal employing entity; and
- (9) All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

**(10) Labor Code § 246(h)** – (10) Written notice of the amount of available paid sick leave on the employee’s pay stub or a separate writing provided with the employee’s payment of wages.

CO. FILE DEPT. CLOCK NUMBER  
ABC 126543 123456 12345 00000000 1

ACME SUPPLIES CORP. 8  
475 KNAPP AVENUE  
ANYTOWN, USA 10101

Social Security Number: 9999  
Taxable Marital Status: Married  
Exemptions/Allowances:  
Federal: 3, \$25 Additional Tax  
State: 2  
Local: 2

### Earnings Statement

Period ending: 6 7/18/2008  
Pay date: 6 7/25/2008

**JANE HARPER**  
101 MAIN STREET  
ANYTOWN, USA 12345

Earnings	rate	hours	this period	year to date
Regular	<span style="border: 1px solid red; padding: 2px;">9</span> 10.00	32.00	<span style="border: 1px solid red; padding: 2px;">2</span> 320.00	16,840.00
Overtime	15.00	1.00	15.00	780.00
Holiday	10.00	8.00	80.00	4,160.00
Tuition			37.43*	1,946.80
			<b>Gross Pay</b>	<b>\$ 452.43</b>
				23,526.80

Deductions	Statutory		
	Federal Income Tax	- 40.60	2,111.20
	Social Security Tax	- 28.05	1,458.60
	Medicare Tax	- 6.56	341.12
	NY State Income Tax	- 8.43	438.36
	NYC Income Tax	- 5.94	308.88
	NY SUI/SDI Tax	- 0.60	31.20
	<b>Other</b>		
	Bond	- 5.00	100.00
	401(k)	- 28.85*	1,500.20
	Stock Plan	- 15.00	150.00
	Life Insurance	- 5.00	50.00
	Loan	- 30.00	150.00
	<b>Adjustment</b>		
	Life Insurance	+ 13.50	
	<b>Net Pay</b>	<b>\$ 291.90</b>	

\* Excluded from federal taxable wages

Your federal wages this period are \$386.15

Other Benefits and Information	this period	total to date
Group Term Life	0.51	27.00
Loan Amt Paid		840.00
Vac Hrs		40.00
Sick Hrs		16.00
Title	Operator	

**Important Notes**

EFFECTIVE THIS PAY PERIOD YOUR REGULAR HOURLY RATE HAS BEEN CHANGED FROM \$8.00 TO \$10.00 PER HOUR.

WE WILL BE STARTING OUR UNITED WAY FUND DRIVE SOON AND LOOK FORWARD TO YOUR PARTICIPATION.

# So, where's the error?

- (1) Gross wages earned;
- (2) Total hours worked (except salaried exempt employees);
- (3) Piece rate units and rate, if applicable;
- (4) All deductions, including taxes, disability insurance, and health and welfare payments (deductions ordered by the employee may be aggregated and shown as one item);
- (5) Net wages earned;
- (6) The inclusive dates of the pay period;
- (7) The name of the employee along with his or her social security number (last four digits only) or an employee identification number;
- (8) The name and address of the legal employing entity; and
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475 KNAPP AVENUE  
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Pay date: 7/25/2008

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Taxable Marital Status: Married  
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State: 2  
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JANE HARPER  
101 MAIN STREET  
ANYTOWN, USA 12345

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<b>Adjustment</b>			
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TEAR HERE

# Penalties for a Paystub Violation

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- **Labor Code Penalties under § 226(e)**

- Initial pay period: Greater of actual damages, or \$50
- Subsequent pay periods: Greater of actual damages, or \$100 per pay period
- One year SOL
- Attorneys fees and costs

- **Plus PAGA Penalties under § 2699**

- “Initial violation”: \$100 per pay period
- “Subsequent violations”: \$200 per pay period (employer must have some notice before 2x penalty applies)
- One year SOL
- Attorneys fees and costs

- **Plus Civil Penalties under § 226.3**

- Initial citation by Labor Commissioner: \$250 per employee per violation.
- Subsequent citations by Labor Commissioner: \$1,000 per employee for each violation.
- “The civil penalties provided for in this section are in addition to any other penalty provided by law.”

# The Right to “Cure”

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- Two types of paystub violations are “curable” under PAGA
  - the start and end dates for the pay period, and
  - the legal name and address of the employer.
- How to cure (good luck):
  - Within 33 days, provide a “a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice.”
- Curing only eliminates PAGA penalties. Employers are still exposed to the statutory penalties under Labor Code Section § 226.

# Penalties Per Employee

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## ■ Best Case Scenario

- Pay Period 1
  - Labor Code Penalty (\$50) + PAGA Penalty (\$100) = \$150
- Pay Periods 2 through 26
  - Labor Code Penalty (\$100 x 25) + PAGA Penalty (\$100 x 25)\* = \$5000
- *Total = \$5150 per employee*

## ■ Worst Case Scenario

- Pay Period 1
  - Labor Code Penalty (\$50) + PAGA Penalty (\$100) = \$150
- Pay Periods 2 through 26
  - Labor Code Penalty (\$100 x 25) + PAGA Penalty (\$200 x 25)\* = \$7500
- *Total = \$7650 per employee*

- Plus: Possible (but rare) citations from Labor Commissioner at \$250 for initial violation – per employee – and \$1000 for subsequent violations.

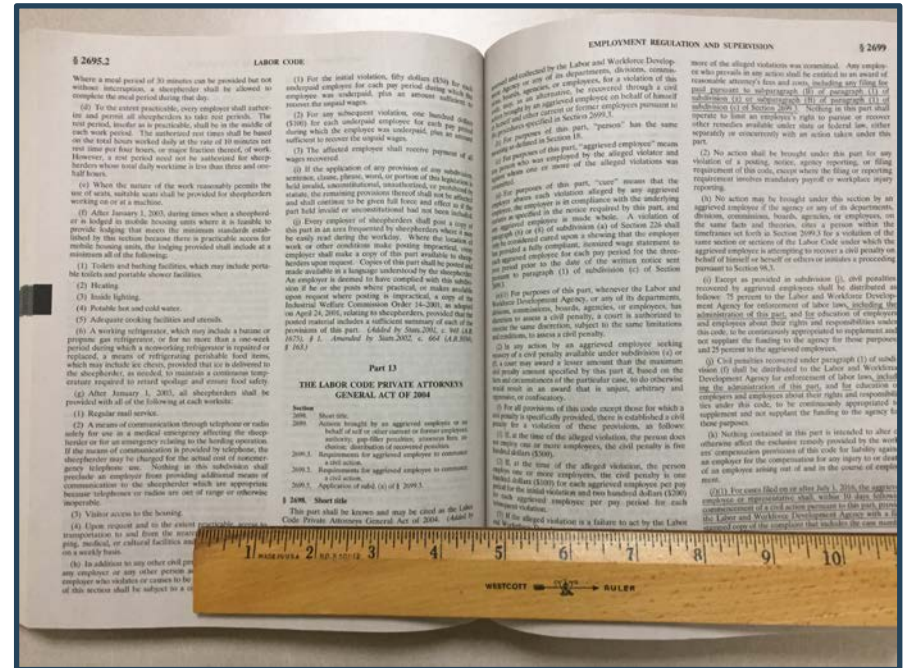
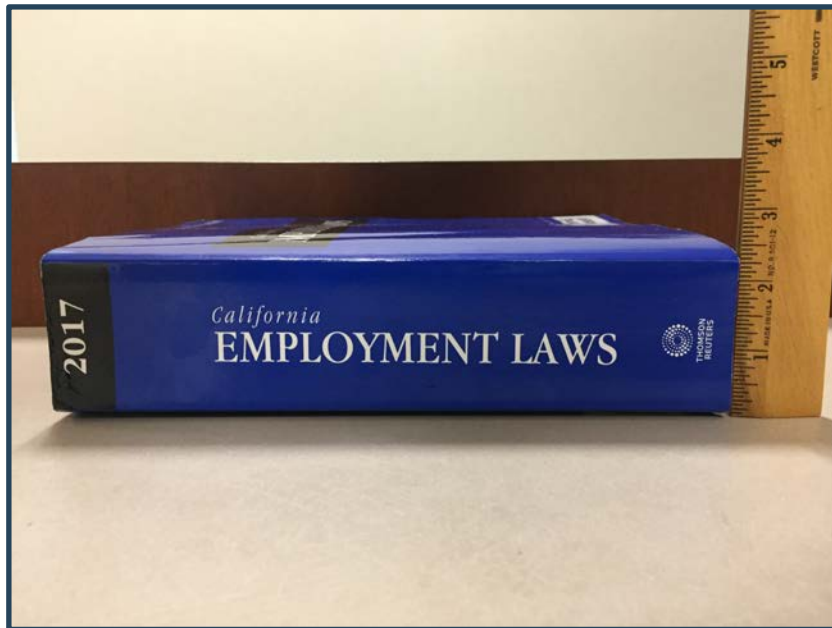
*\*Examples assume bi-monthly pay periods. Penalties could be more, or less, depending on the frequency of pay.*



# Penalties in Perspective

Workforce Size	Best Case Scenario	Worst Case Scenario
10	\$51,500	\$76,500
25	\$128,750	\$191,250
50	\$257,500	\$382,500
75	\$386,250	\$573,750
100	\$515,000	\$765,000
150	\$772,500	\$1,147,500
200	\$1,030,000	\$1,530,000
250	\$1,287,500	\$1,912,500
300	\$1,545,000	\$2,295,000
350	\$1,802,500	\$2,677,500

# Paystubs aren't even the tip of the iceberg...



*Q: Why CABIA?*

*A: Because everyone loses under PAGA, save the Plaintiffs' lawyers*

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### Case Study

*Price v. Uber Technologies* – PAGA suit alleging that Uber treated drivers like independent contractors but should have treated them like employees, where “treated” means: pay minimum wage, provide meal and rest breaks, ect.

- Number of Drivers: 1.5 million
- Estimated liability: \$1 billion plus
- Recently Approved Settlement: \$7,500,000\*
- Settlement Breakdown:
  - Lawyers = \$2,325,000
  - State = \$3,681,250
  - Claims administrator = \$775,000
  - Average Uber driver = \$1.08

\*Approximately 0.0075% of the penalties calculated by the California agency.

# The Best Defense Is A Good Offense...

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1. Wage and Hour Audit
  - i. Paystubs
  - ii. Working Hours / Breaks
  - iii. Equipment / Gear
  - iv. Payment of Wages
  - v. Vacation
  - vi. Expense Reimbursement
2. Other Policies and Practices
  - i. Recruiting / Hiring / Discipline
  - ii. Accommodations / Leaves
  - iii. OSHA
  - iv. Required Postings

# Questions?

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