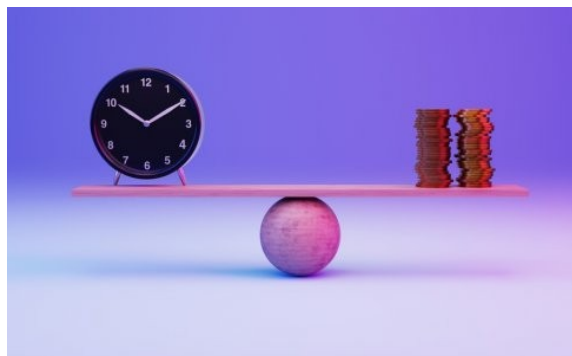


Key Trends in PAGA Arbitration Decisions: Insights for Employers and Legal Counsel

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The proliferation of wage and hour litigation in California and recent significant changes to the law have created uncertainty for employers and their lawyers alike. Both recent PAGA (Private Attorneys General Act of 2004) reform legislation and critical court decisionsⁱ have changed the landscape for employers seeking to prevent and defend these wage and hour claims.

Generally speaking, PAGA allows employees who have suffered Labor Code violations (such as the failure to provide minimum wage, overtime, accurate wage statements, and proper meal and rest breaks) to sue their employers on behalf of the state for Labor Code violations—even for violations that affect other employees. In essence, the California Attorney General has deputized employees to pursue Labor Code violations on their behalf in an effort to enforce wage and hour laws. While most employers are familiar with the risk associated with wage and hour class actions, the companion PAGA claims are on the rise and being pursued by employees at a rapidly increasing rate.

While recent PAGA reform law has arguably helped to limit aspects of the law, including requiring employees to suffer violations and have standing to do so, before bringing lawsuits, reducing certain repetitive damages, and allowing for the potential early cure or resolution of claims in some instances, ultimately the reforms have not slowed the momentum of these lawsuits against employers. More precisely, the reform has provided additional tools and defenses to employers to address the lawsuits.

With this in mind, it becomes even more apparent that the goal of every employer should be to take steps to prevent or minimize the chances of large representative wage and hour lawsuits against their business. The drafting and implementing arbitration clauses and class action/PAGA waivers can accomplish this.

Many employers seek to use arbitration agreements to keep these kinds of claims out of court. However, recent legal decisions threaten to make it much more difficult to use these measures to avoid legal claims unless the agreements are carefully drafted.

More recently, California courts have been active in issuing decisions that clarify the effectiveness of arbitration provisions in subsequent lawsuits to force employees into less dangerous and less expensive individual arbitrations versus full-blown representative actions. Three very recent decisions issued in 2025 from California's Second District Court of Appeal underscore the importance of well-crafted arbitration and class action and PAGA waivers.ⁱⁱ

Key Legal Decisions Shaping Arbitration Agreements

Ballesteros v. FormFactor, Incⁱⁱⁱ

In a clear example of courts nitpicking imprecise arbitration clause language to allow employee representative claims to proceed to court, the Court of Appeal in *Ballesteros* interpreted the employer arbitration agreement, to exclude all PAGA claims from the scope of the arbitration agreement. The court based its decision on some imprecisely drafted language in an arbitration clause that failed to accurately list PAGA claims as claims pursued on behalf of the state of California. As a result, rather than the arbitration agreement being interpreted to send claims to arbitration, the Court found that the arbitration agreement specifically allowed representative PAGA claims to be pursued in court.^{iv}

The Court determined that the arbitration agreement excluded from arbitration PAGA “representative actions” without distinguishing between claims brought on an individual or nonindividual basis.

This decision is instructive because the Court chose a very favorable interpretation of the arbitration clause for the employee and went to great lengths to justify its position. The decision serves as a warning that arbitration clauses must be regularly updated to avoid these types of consequences.

Cusimano v. Brilliant Earth, LLC^v

In the *Cusimano* decision, the Court of Appeal ruled that the entire arbitration agreement was unenforceable because the agreement to arbitrate contained an unenforceable waiver of nonindividual PAGA claims.

Initially, the Court concluded that the arbitration agreement was flawed because it improperly barred employees from bringing representative actions against their employers.

The Court found that the arbitration agreement contained a nonseverability clause that tied the validity of the agreement as a whole to the validity of the defective waiver of nonindividual PAGA claims and found the full agreement to be invalid, directing the entire matter for resolution in court.^{vi}

Much of the Court’s decision was premised on the flawed and unenforceable draft language in the employer documents. The Court was even more assertive in *Cusimano* in declaring that imprecise drafting and defects will result in employers being forced to litigate class action and PAGA claims in court.

Cusimano reinforces the trend of courts strictly scrutinizing employer-drafted arbitration clauses, allowing costly representative litigation to proceed for employees against their employers.

Arzate v. ACE American Insurance Company^{vii}

In *Arzate*, a costly appeal was won, at least in part due to effective (while imperfect) drafting of their arbitration language.

The Court of Appeal’s analysis in *Arzate* centered on the interpretation of arbitration agreements and which party was required to initiate arbitration. The arbitration language at issue required that any party who sought to initiate arbitration must do so within thirty days.

The Court determined that the only party who would seek to initiate a claim would be a party seeking relief or, in other words, an employee. As a result, the Court of Appeal found that the employer was not required to initiate arbitration and, as a result, did not breach the arbitration agreements or waive its right to arbitrate.

Tellingly, the Court made clear that while the employer “arguably could have used different language in the arbitration rules and procedures to underscore this point, [] the document appear[ed] to be written with a minimal amount of legalese for the benefit of employees without legal training. Read in the context of the entire agreement, the colloquial language shows that the plaintiffs were the party that “want[ed] ... [a]rbitration,” and that they were required to file a demand to initiate the process given their agreement that they would “submit” their employment-related claims to arbitration.”

While, ultimately, this decision favored the employer, the trend is clear: Employers must seek regular guidance from their

attorneys who monitor these decisions and can provide cutting-edge advice to avoid these types of legal issues.

Implications for Employers

These cases illustrate a trend in Second District jurisprudence regarding the importance of precision in drafting arbitration provision language. While the law has an underlying strong public policy favoring arbitration, these decisions establish a recurring pattern of the refusal to enforce unclear arbitration provisions in a variety of contexts.

Poorly drafted provisions can result in significant litigation, which likely would have been avoided if carefully considered language was utilized. These problems are clearly demonstrated through the various interpretations of the arbitration clauses invalidity and the Court's unwillingness to enforce them in various scenarios.

A carefully crafted arbitration provision and class action/PAGA waiver should be clearly worded, voluntary in nature, fair, and mutual, and include adequate notice to the employee. The provisions should also take into consideration recent decisions which, provide more specific guidance as to pitfalls that must be avoided. These recent decisions serve as a warning: employers who fail to seek regular review may find themselves embroiled in costly and unnecessary litigation without defenses that were otherwise available to them.

Action Plan: Steps Employers Should Take

Every employer should take this opportunity to seek a review of existing forms provided to their employees or put in place new forms that will ensure adequate protection and insulate them from costly wage and hour litigation in the future.