

9th Circ. Could Mend Split On Class Rules For PAGA Claims

By **Felix Shafir and John Querio**

The California Labor Code Private Attorneys General Act authorizes an employee who has been harmed by particular Labor Code violations to seek penalties "on behalf of himself or herself and other aggrieved employees."^[1] PAGA therefore allows aggrieved employees to bring representative actions.^[2]

Federal district courts are sharply divided over whether PAGA claims must satisfy Federal Rule of Civil Procedure 23's class action requirements to proceed as representative actions in federal court. The U.S. Court of Appeals for the Ninth Circuit is poised to resolve this split of authority in *Canela v. Costco Wholesale Corp.*^[3]

A minority of district courts require representative PAGA claims to satisfy federal class action requirements.

In California courts, PAGA claims do not need to comply with California class action requirements to proceed as representative actions.^[4] The California Supreme Court has blessed such statutory nonclass representative actions as a matter of state law and held they do not violate due process.^[5]

A number of federal district courts, however, have held that PAGA claims must nonetheless meet federal class action requirements to proceed as representative actions in federal court.^[6] These decisions generally follow two rationales.

Rule 23 Requirements

Several courts have decided that Federal Rule of Civil Procedure 23 requires PAGA claims to meet federal class action requirements to proceed as representative actions in federal court.

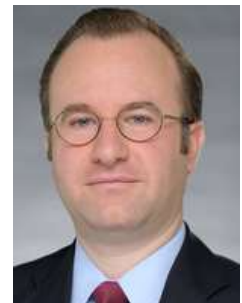
According to the California Supreme Court, PAGA "does not create property rights or other substantive rights" and "is simply a procedural statute allowing an aggrieved employee to recover civil penalties that otherwise would be sought by state labor law enforcement agencies."^[7] That PAGA does no more than create a procedure for recovering penalties is significant because, "[under] the doctrine of *Erie R.R. v. Tompkins* ... federal courts sitting in diversity must apply the Federal Rules of Civil Procedure."^[8] Federal courts proceeding under diversity jurisdiction therefore "apply state substantive law and federal procedural rules."^[9]

Rule 23 allows for representative actions in federal courts under certain circumstances.^[10] This rule is procedural in nature^[11] and, "like the rest of the Federal Rules of Civil Procedure, Rule 23 automatically applies 'in all civil actions and proceedings in the United States District Courts.'"^[12] When Rule 23 conflicts with an inconsistent state procedural rule, Rule 23 controls.^[13]

Consequently, district courts have concluded that, "[r]egardless of whether PAGA suits can proceed in a California state court without meeting California's requirements for class



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actions, PAGA cannot be interpreted to operate in a federal court sitting in diversity in a manner that would trump Rule 23's requirements governing representative actions in a federal court."^[14] Because PAGA "provides for recovery to unnamed nonparties, it contravenes federal procedural requirements," and a plaintiff who seeks "to bring a representative PAGA action on behalf of other non-party, unnamed aggrieved employees in federal court ... must meet the requirements of Rule 23."^[15]

Standing Requirements

Several courts have also decided that representative PAGA claims must satisfy Rule 23 due to standing requirements for representative actions.

The "usual rule [is] that litigation is conducted by and on behalf of the individual named parties only."^[16] Rule 23 is a narrow exception to this rule, allowing plaintiffs to maintain representative actions in federal court based on the injuries of those who are not themselves named parties as long as the plaintiffs can satisfy Rule 23's requirements.^[17]

In light of this mandatory standing requirement, various district courts have rejected the notion that an aggrieved employee asserting a representative PAGA claim has "standing to seek PAGA penalties as to every type of Labor Code violation, every employee, and every [employer] location, without satisfying the requirements of Rule 23."^[18] Plaintiffs "lack standing to assert a non-class representative claim under PAGA."^[19]

A majority of district courts decline to apply federal class action requirements to representative PAGA claims, but there is reason to doubt the correctness of this position.

The majority of district courts disagree with the view that representative PAGA claims must satisfy federal class action requirements.^[20] This view generally stresses that PAGA claims are brought by the aggrieved employee as a proxy for the state, and therefore concludes that PAGA is "substantive" for purposes of Erie because it gives plaintiffs a "right to recover" in specified circumstances.^[21] Since these courts maintain that the representative proceedings authorized by PAGA are substantive in nature, they reason that PAGA claims need not satisfy Rule 23's procedural requirements to proceed as representative actions in federal court. There is reason to question whether this rationale comports with U.S. Supreme Court and Ninth Circuit precedent.

As one court embracing the contrary view explained, "the characterization of PAGA actions as a 'law enforcement action' is entirely artificial. It is unclear what the distinction between a 'law enforcement action' and a 'class action' would be. PAGA actions are civil actions 'brought by an aggrieved employee on behalf of himself or herself and other current or former employees,' ... supporting the conclusion that a PAGA action is akin to a representative action that falls within the scope of Rule 23."^[22]

Indeed, Ninth Circuit and California Supreme Court case law casts doubt on whether a PAGA claim's characteristics are materially different from the type of representative proceedings that ordinarily fall within Rule 23's ambit.

For example, although the Ninth Circuit has concluded there are differences between representative PAGA actions and class actions, the court has explained that, under California law, "every PAGA action ... is a representative action on behalf of the state."^[23] Similarly, while the Ninth Circuit has said "a PAGA suit is fundamentally different than a class action" because a "PAGA action is at heart a civil enforcement action filed on behalf of and for the

benefit of the state,"[24] the court has decided that PAGA claims nonetheless differ from traditional claims brought on behalf of a government because they remain under the plaintiff's control unless the state becomes involved in the lawsuit (for instance, by joining or otherwise intervening in the action).[25]

Additionally, the Ninth Circuit has held that the wage-and-hour rights vindicated by PAGA claims are held by employees individually, and indicated that aggrieved employees are the real parties to the controversy underlying a PAGA claim.[26] And the California Supreme Court has concluded that representative PAGA claims allow for the same type of broad, representative discovery as class actions.[27] Simply put, there are critical differences between traditional actions commenced on a state enforcement agency's behalf and representative PAGA actions.[28]

Moreover, even if representative PAGA actions were sharply different from the type of representative actions typically encompassed by Rule 23, there are serious reasons to doubt whether plaintiffs could pursue representative PAGA claims in federal court without satisfying Rule 23, given the standing requirements for proceeding in a federal forum on behalf of a third party.

The U.S. Supreme Court has held that a plaintiff in federal court "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." [29] Absent this limitation, federal courts would improperly "be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." [30]

Thus, "a plaintiff whose cause of action is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court" if he cannot satisfy standing requirements.[31] This is so because, "[h]owever extensive their power to create and define substantive rights, the states have no power directly to enlarge or contract federal jurisdiction." [32]

Standing requirements "[ensure] that the Federal Judiciary respects 'the proper — and properly limited — role of the courts in a democratic society,'" and "[s]tates cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse." [33] For these reasons, several district courts have concluded standing requirements bar plaintiffs from pursuing representative PAGA claims in federal court without satisfying the usual Rule 23 requirements for representative proceedings.[34]

The contrary view embraced by a majority of district courts generally emphasizes that representative PAGA claims are, in effect, *qui tam* claims.[35] The California Supreme Court has characterized a representative PAGA action as "a type of *qui tam* action," [36] and district courts adhering to the majority view observe that the U.S. Supreme Court has held that individual plaintiffs "bringing *qui tam* suits on behalf of the government have Article III standing." [37]

But the precedent on which these courts rely — *Vermont Agency of Natural Resources v. United States ex rel. Stevens* [38] — is narrower than these courts suggest. There, the plaintiff sued pursuant to a provision of the federal False Claims Act authorizing a party to "bring a *qui tam* civil action 'for the person and for the United States Government'" based on certain forms of fraudulent misconduct.[39]

The U.S. Supreme Court addressed whether the plaintiff could show the constitutional injury in fact necessary to demonstrate his lawsuit was a case or controversy within the meaning of Article III of the U.S. Constitution.[40] The Supreme Court held that the plaintiff could meet this requirement because the federal statute partially assigned to him the government's damages for its injuries.[41]

Whether a named plaintiff can proceed with a representative action in federal court, however, involves a different standing requirement. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, [the U.S. Supreme] Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." [42]

This distinct limitation stems from prudential interests of judicial self-governance rather than from Article III itself.[43] The high court refers to this limitation as a restriction on third-party standing.[44] A departure from this rule against third-party standing is justified only when a representative lawsuit falls within an express exception to the "usual rule" requiring "litigation [to be] conducted by and on behalf of the individual named parties only." [45]

As a result, whether a qui tam plaintiff can satisfy the injury-in-fact element of Article III's case-or-controversy requirement does not necessarily answer whether the plaintiff can meet the distinct third-party standing requirements for representative claims in federal court. In this respect, "the characterization and treatment of PAGA claims [as qui tam claims] under state law" should be "irrelevant to the question of whether Rule 23 applies to a PAGA claim brought in federal court as a diversity action." [46]

In recent years, the U.S. Supreme Court has suggested that prudential standing is "in some tension with [the high court's] reaffirmation of the principle that 'a federal court's 'obligation' to hear and decide' cases within its jurisdiction 'is 'virtually unflagging.'"" [47] But the Supreme Court raised this suggestion in the distinct context of assessing whether, as a matter of statutory interpretation, a substantive federal law afforded particular plaintiffs a right to sue on their own behalf (i.e., in a nonrepresentative capacity), and concluded this assessment fell outside the rubric of prudential standing. [48]

The Supreme Court explained that the case involving that context did "not present any issue of third-party standing," and therefore said "consideration of that doctrine's proper place in the standing firmament can await another day." [49] Intermediate federal appellate courts have thus held that the Supreme Court's cases limiting the rights of named plaintiffs to sue on behalf of others who choose not to sue "remain good law." [50]

Federal laws and the Federal Rules of Civil Procedure can overcome these prudential standing barriers by allowing litigants to sue on behalf of others. If a party satisfies Article III's case-or-controversy requirement, then "persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of legal rights and interests of others, and indeed, may invoke the general public interest in support of their claim" in federal court. [51] And the Federal Rules of Civil Procedure are "as binding as any statute duly enacted by Congress." [52]

For example, Rule 23 is a narrow exception to the rule against third-party standing, allowing those who meet its prerequisites to proceed on behalf of absent putative class members in a federal forum. [53] Similarly, some federal appellate courts have concluded that, by enacting federal qui tam statutes, Congress has authorized private plaintiffs to sue on behalf of the government in a federal forum under those provisions. [54]

But district courts that require plaintiffs to satisfy Rule 23's class certification requirements reject the premise that state laws can likewise overcome standing requirements to allow representative actions in a federal forum. These courts have decided that "no federal rule [authorizes] the maintenance of a representative action outside those authorized by Rule 23." [55]

"Nothing in the text of Rule 23 suggests that the door is left open for states to enact rules that circumvent the requirements of Rule 23 by requiring federal courts sitting in diversity to entertain what is for all practical purposes a class action — in circumstances that Rule 23 would not permit." [56] In short, under this view, "although PAGA authorizes representative actions, California state law cannot alter federal procedural and jurisdictional requirements." [57]

The Ninth Circuit is poised to decide whether federal class action requirements apply to representative PAGA actions in federal court.

In *Canela v. Costco*, the Ninth Circuit is positioned to resolve this long-simmering split of authority over Rule 23's applicability to representative PAGA claims. [58]

The plaintiff Liliana Canela sued Costco for failing to provide suitable seats to employees in violation of California law. [59] Her complaint alleged one cause of action under PAGA. [60] Costco moved for partial summary judgment, arguing that Canela could not represent unnamed third parties in federal court without satisfying Rule 23's class action requirements.

The district court denied Costco's motion, concluding that Canela had standing to bring her representative PAGA claim and that her claim did not need to satisfy Rule 23's requirements. [61] Subsequently, the district court certified this decision for interlocutory appeal. [62] The Ninth Circuit has agreed to take up the appeal.

Canela has been fully briefed, and the Ninth Circuit may set oral argument in the next few months. Until the Ninth Circuit resolves the question, federal district courts in California will remain divided over Rule 23's applicability to representative PAGA claims in federal court.

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Disclosure: The authors and the firm have handled appeals in wage-and-hour lawsuits asserting PAGA claims.

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[1] *Williams v. Super. Ct.*, 3 Cal. 5th 531, 538-39, 545 (2017).

[2] See *id.* at 537.

[3] Ninth Circuit case no. 18-16592.

- [4] *Arias v. Super. Ct.*, 46 Cal. 4th 969, 980-87 (2009).
- [5] *Id.* at 982-83, 985.
- [6] See, e.g., *Raphael v. Tesoro Refining & Marketing Co. LLC*, 2015 WL 5680310, at *2 (C.D. Cal. Sept. 25, 2015); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *3-*4 (C.D. Cal. Apr. 23, 2015); *Medlock v. Taco Bell Corp.*, 2014 WL 4319510, at *6-*8 (E.D. Cal. Aug. 29, 2014); *Taylor v. W. Marine Prods., Inc.*, 2014 WL 1248162, at *2 (N.D. Cal. Mar. 26, 2014); *Halliwell v. A-T Solutions*, 983 F.Supp. 2d 1179, 1182-84 (S.D. Cal. 2013); *Fields v. QSP, Inc.*, 2012 WL 2049528, at *4-*5 (C.D. Cal. June 4, 2012); *Williams v. Lockheed Martin Corp.*, 2011 WL 4634269, at *2 (S.D. Cal. Oct. 5, 2011); *Ivey v. Apogen Techs., Inc.*, 2011 WL 3515936, at *3 (S.D. Cal. Aug. 10, 2011); *Thompson v. APM Terminals Pac. Ltd.*, 2010 WL 6309364, at *2 (N.D. Cal. Aug. 26, 2010); *Adams v. Luxottica U.S. Holdings Corp.*, 2009 WL 7401970, at *5-*7 (C.D. Cal. July 24, 2009); *In re Verity Health Sys. of Cal., Inc.*, 2019 WL 2461688, at *10 (Bankr. C.D. Cal. June 11, 2019).
- [7] *Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.*, 46 Cal. 4th 993, 1003 (2009).
- [8] *Knievel v. ESPN*, 393 F.3d 1068, 1073 (9th Cir. 2005).
- [9] *Cuprite Mine Partners LLC v. Anderson*, 809 F.3d 548, 554 (9th Cir. 2015).
- [10] *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1105 (9th Cir. 2018).
- [11] *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980).
- [12] *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (majority opinion).
- [13] *Id.* at 406 (plurality opinion).
- [14] *Medlock*, 2014 WL 4319510, at *7.
- [15] *Ivey*, 2011 WL 3515936, at *3 (quoting *Thompson*, 2010 WL 6309364, at *2); accord, e.g., *Halliwell*, 983 F. Supp. 2d at 1183-84.
- [16] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011).
- [17] See *id.* at 345-49.
- [18] *Taylor W. Marine Prods., Inc.*, 2014 WL 1248162, at *2-*3.
- [19] *Adams*, 2009 WL 7401970, at *7.
- [20] See, e.g., *Hamilton v. Wal-Mart Stores, Inc.*, 2019 WL 1949456, at *8-*9 (C.D. Cal. Mar. 4, 2019); *Vawater v. United Parcel Serv., Inc.*, 2018 WL 6074546, at *2-*3 (C.D. Cal. July 25, 2018); *Jordan v. NCI Grp., Inc.*, 2017 WL 1821122, at *3-*4 (C.D. Cal. Mar. 22, 2017); *Shiferaw v. Sunrise Senior Living Mgmt., Inc.*, 2016 WL 6571270, at *16 (C.D. Cal. Mar. 21, 2016); *Zackaria v. Wal-Mart Stores, Inc.*, 142 F.Supp. 3d 949, 954-58 (C.D. Cal. 2015); *Achal v. Gate Gourmet, Inc.*, 114 F.Supp. 3d 781, 805-10 (N.D. Cal. 2015); *Moua v. Int'l Bus. Machines Corp.*, 2012 WL 370570, at *7-*8 (N.D. Cal. Jan. 31,

2012); Cardenas v. McLane Foodservice, Inc. [●](#), 2011 WL 379413, at *2-*3 (C.D. Cal. Jan. 31, 2011); Mendez v. Tween Brands, Inc. [●](#), 2010 WL 2650571, at *2-*4 (E.D. Cal. July 1, 2010).

[21] Achal, 114 F. Supp. 3d at 807-10.

[22] Medlock, 2014 WL 4319510, at *7.

[23] Sakkab v. Luxottica Retail N. Am., Inc. [●](#), 803 F.3d 425, 435-40 & n.11 (9th Cir. 2015) (quoting Iskanian v. CLS Transp. Los Angeles, LLC [●](#), 59 Cal. 4th 348, 387 (2014)).

[24] Baumann v. Chase Inv. Servs. Corp. [●](#), 747 F.3d 1117, 1123-24 (9th Cir. 2014).

[25] Porter v. Nabors Drilling USA, L.P. [●](#), 854 F.3d 1057, 1062 (9th Cir. 2017).

[26] Urbino v. Orkin Servs. of Cal., Inc. [●](#), 726 F.3d 1118, 1122-23 (9th Cir. 2013).

[27] Williams, 3 Cal. 5th at 537, 548.

[28] Nanavati v. Adecco USA, Inc. [●](#), 99 F. Supp. 3d 1072, 1082 (N.D. Cal. 2015).

[29] Warth v. Seldin [●](#), 422 U.S. 490, 499 (1975).

[30] Id. at 500.

[31] Lee v. Am. Nat'l Ins. Co. [●](#), 260 F.3d 997, 1001-02 (9th Cir. 2001).

[32] Fiedler v. Clark [●](#), 714 F.2d 77, 80 (9th Cir. 1983).

[33] Hollingsworth v. Perry [●](#), 570 U.S. 693, 715 (2013).

[34] See, e.g., Raphael, 2015 WL 5680310, at *2; Medlock, 2014 WL 4319510, at *7; Ivey, 2011 WL 3515936, at *3.

[35] See, e.g., Shiferaw, 2016 WL 6571270, at *16; Zackaria, 142 F. Supp. 3d at 956-57; Achal, 114 F. Supp. 3d at 807-10.

[36] Iskanian, 59 Cal. 4th at 382.

[37] Achal, 114 F. Supp. 3d at 807.

[38] 529 U.S. 765 (2000).


[39] Id. at 768-69.

[40] Id. at 771-74.

[41] Id.

[42] Warth, 422 U.S. at 499.

[43] Id. at 499-500.

[44] Lexmark Int'l, Inc. v. Static Control Components, Inc. , 572 U.S. 118, 127 n.3 (2014).


[45] Wal-Mart Stores, Inc., 564 U.S. at 348.

[46] Medlock, 2014 WL 4319510, at *7.


[47] Lexmark Int'l, Inc., 572 U.S. at 125-26.

[48] Id. at 126-27.


[49] Id. at 127 n.3.

[50] Parent/Professional Advoc. League v. City of Springfield , ___ F.3d ___, 2019 WL 3729033, at *14 & n.20 (1st Cir. 2019).

[51] Warth, 422 U.S. at 501.

[52] Bank of Nova Scotia v. United States , 487 U.S. 250, 255 (1988).

[53] See Wal-Mart Stores, Inc., 564 U.S. at 348


[54] See, e.g., United States ex rel. Hall v. Tribal Dev. Corp. , 49 F.3d 1208, 1214-15 (7th Cir. 1994).

[55] Medlock, 2014 WL 4319510, at *7.

[56] Id.


[57] Raphael, 2015 WL 5680310, at *2 (quoting Adams, 2009 WL 7401970, at *2).

[58] Ninth Circuit case no. 18-16592.

[59] Canela v. Costco Wholesale Corp. , 2018 WL 2331877, at *1 (N.D. Cal. May 23, 2018).

[60] Id. at *2-*4.

[61] Id. at *4-*10.

[62] Canela v. Costco Wholesale Corp. , 2018 WL 3008532, at *1-*4 (N.D. Cal. June 15, 2018).