

# Passion: That Secret Ingredient

I recall a never ending stream of assignments handed to me in the form of journal entries, analytic essays, college application essays, and research projects. I recall reading each one and checking to make sure it met the basic requirements. But mostly I recall hoping to find in those assignments a secret ingredient: Passion. When I did, I rejoiced, both for myself, and for my students.

For years, I taught high school English. And for years, I guided students in mastering the mechanics of writing - structure, syntax, diction, analysis - those crucial building blocks. But the best writing came only



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when they discovered their "voice" and wrote with that. Excellence: The secret ingredient is passion.

For 15 years, I urged my students not only to write with it, but to create lives that would express it. And then I decided to follow my own advice. Looking for new ways to contribute, I decided to enter the field of law.

Today, I serve public education as an attorney, working at Fagen Friedman & Fulfroist, one of the fastest-growing public education law firms in California. But it is not as though I moved from the classroom to the courtroom. At Fagen Friedman & Fulfroist, I oversee the firm's Business Facilities & Real Estate Practice Group, devoting a significant amount of my practice to helping public schools build state of the art facilities for 21st century education. As a part of that, help them go green.

One of my passions is, and always has been, the environment. As a child I loved gardens and growing things. As an adult, I feel the same. My daughter's long-time fascination with the ocean has become my own. The natural world utterly intrigues me. And today, as we face unprecedented environmental challenges, I know that our schools - 1,039 public school districts serving 6.5 million students in California - play a vital role in advancing environmentally sensitive construction, reduced energy demands, and behavior changes that will help protect the our planet.

As attention to the environment gathers momentum, school districts feel the need to change. They see an obligation to minimize energy consumption and reduce waste. Courageous school districts, like the Irvine Unified School District and Chabot Las Positas Community College, lead the way and are completely revamping the construction and operation of their facilities.

Emerging technology can present as many questions as it does promises. Solar power, wind power, biomass, grid neutral - to some these emerging technologies and concepts are a burden, too fraught with certainty to embrace. Others find them challenging. I see adventure, excitement, and a chance to indulge my love for the natural world. So when school districts call for legal assistance - what questions to ask, how to evaluate an energy proposal, what new and different language to include in documents - I approach the work with enthusiasm.

I am committed to public education. I believe it is the single greatest investment in our future and the greatest guarantee that every individual in our nation might know his or her potential. For years, I served public education on the front line as a classroom teacher. Today, I combine my passion for the future of public education with concern for the environment by helping build and renovate schools for a more sustainable Earth.

## Lawsuits Against Employers, a Whole New Playing Field

On June 29, 2009, the California Supreme Court ruled that a single plaintiff may seek civil penalties pursuant to the Labor Code Private Attorneys General Act of 2004 (PAGA) on behalf of other current and former employees without need to certify a class, and without notice to those persons. *Arias v. Superior Court (Angelo Dairy)*, 46 Cal. 4th 969. The Court based its decision on provisions within PAGA that read "notwithstanding any other provision of law" an "aggrieved party" may bring suit "on behalf of himself or herself and any other current or former employees against whom one or more of the alleged violations was committed." The Court reasoned that the phrase "notwithstanding any other provision of law" was intended to set aside all "contrary" law, and then concluded, without elaboration, that class action procedures are somehow "contrary" to bringing suit "on behalf of himself or herself and any other current or former employees."



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given the existent strain on courts' dockets. The task is made more daunting by the fact that party-discovery devices (interrogatories, requests for inspection, depositions on notice) are not available against these "represented" persons.

Equally ominous is the Court's discussion of subsequent lawsuits brought on the same facts. If a PAGA plaintiff secures a judgment in its favor on these penalty claims, the *Arias* Court made clear that the represented persons may then use that PAGA judgment to collaterally estop the employer from denying liability in future suits on the same violations. And where the employer wins on the PAGA claim, the Court made clear that the judgment bars subsequent claims by "represented" persons for PAGA penalties, but not for other remedies such as wages, or other statutory penalties. This holding appears to forge new ground in the area of primary rights and claim merger. Traditionally, a party to litigation must bring all claims and theories arising from a primary right in a single action, or will forever lose such claims upon entry of judgment. The *Arias* Court nonetheless stated that "represented" persons in a PAGA action, who are treated "as though the person were a party," are not required to bring all related claims in that same action. In this new world, employers may confront subsequent suits on the same conduct, with the result in the first suit (tried collectively despite an absence of dominant common issues) controlling all subsequent suits for the same violation.

A further danger is that the prior PAGA judgment could facilitate adjudication of the second wage claim as a class action, regardless of whether that subsequent wage claim could have been certified as a class absent the prior PAGA adjudication. The plaintiffs would argue that the fact-intensive questions that may have inhibited class certification have been litigated to conclusion in the prior PAGA action, cannot now be re-litigated, and therefore do not inhibit class certification of the second suit.

Playing out this adventure, take for example a PAGA action based on misclassification and unpaid overtime. In such cases, the critical question typically is whether a particular employee's day-to-day job activities fit within an exemption - a question on which the employer carries the burden of proof. Employers have often argued with success that, because the question of whether an exemption applies is individualized, exemption cases are not amenable to class treatment. That argument may now be mooted; collected PAGA claims need not be class certifiable. As such, an unprepared employer hit with a PAGA/exemption claim faces an impossible task: proving individually for each of hundreds of "represented" employees that he or she is properly classified (despite an absence of party-discovery rights and limited trial days).

An adverse judgment could then cascade to subsequent class actions brought by "represented" persons for wages on the same violations. For example, assume that after prevailing against the employer on that "representative" PAGA claim based on misclassification, a "represented" employee from that prior action brings a second, subsequent suit for unpaid premium wages for the same misclassification. If such a subsequent action on the same primary right is permitted, the adjudication in the prior PAGA action of the fact-intensive exemption question could be binding, and could thereby eliminate the traditional evidentiary trip hazard to class certification (exemption status) of these wage claims.

Take, as another example, meal and rest break claims. Pending before the California Supreme Court in *Brinker* is the question of what an employer's obligation to "provide" a break entails. That determination will identify which party has the fact-specific burden concerning whether a particular break was freely waived by an employee. Though the weight

of authority holds that such individualized fact-intensive questions are not amenable to class treatment, these claims apparently can be collected in PAGA actions, the outcome of which may be driven by who is assigned the ultimate burden of proof.

Though a future legislative or ballot fix is possible, until such time, employers must understand this new field of play, prepare their defensive tools in advance, and when summoned to court, play well.

An employer's evidence procurement efforts should start now, and be geared toward creating packets of evidence that will throw the burden back to the employer's adversary to disprove. Employers can take simple steps to create these burden-shifting packets. Using the meal/rest period example above, most obviously, employers should have standardized postings plainly advising non-exempt employees that employees are authorized to take the meal and rest breaks. Less obviously, employers should require each non-exempt employee to sign a document that advises the employee in writing of his or her right to take meal and rest periods, and requires the employee to contemporaneously report, via a method that creates a record, any conduct witnessed by the employee that prohibits or dissuades any employee from taking a rest or meal period in accordance with the rights set forth in the document. This, coupled with the absence of contemporaneous complaints, may provide strong evidence that the employer has satisfied its obligation to provide meal and rest periods, and shift the burden to its adversary to negate that authorization for perhaps hundreds or thousands of unique situations.

On the exemption front, a status verification and monitoring sheet could be created for, and signed by, all exempt employees. The employee would be tasked with identifying tasks performed through out the day, and the hours spent on each task. Once exemption status is documented, the employee would be required in subsequent months to gauge her monthly activities and report in writing if her cumulative hours on tasks described as "non-exempt" exceed his or her cumulative hours spent on tasks described as "exempt." Again, this, coupled with an absence of subsequent reporting, may establish a *prima facie* case of exemption, and shift the individualized and fact-intensive burden back to the employee.

Once sued, litigants may attempt to import, and analogize to, judicially created limitations on prior unfair competition law "representative" actions, similar to class requirements, sensibly imposed by courts on the authority that "equitable" actions - such as an unfair competition law claim - are subject to broad judicial discretion. And though "due process" is a phrase that rarely gains traction, if divergent fact patterns are to be collected in "representative" actions without the scrutiny of class certification, strong arguments can be made that the rules of evidence - if not a trial court's calendar - must afford an employer assigned the burden flexibility in the manner in which it is carried. Finally, where a PAGA action is removed to federal court, an employer may argue that the *Erie* Doctrine precludes application state law procedures in federal courts. Specifically, an employer may argue that PAGA's non-class representative provisions are a state procedural device for collecting claims, rather than substantive state law. Notably, in *Arias*, the California Supreme Court stated that a state litigant could choose to pursue a PAGA claim as either a class action or a non-class representative action. If a litigant is free to choose between those two procedural options, then the non-class representative option would not appear to be "substantive" state law. As such, in federal courts, class certification may be required before the plaintiff may act in a representative capacity.

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