Arya Rhodes
SCHIMMEL & PARKS, APLC

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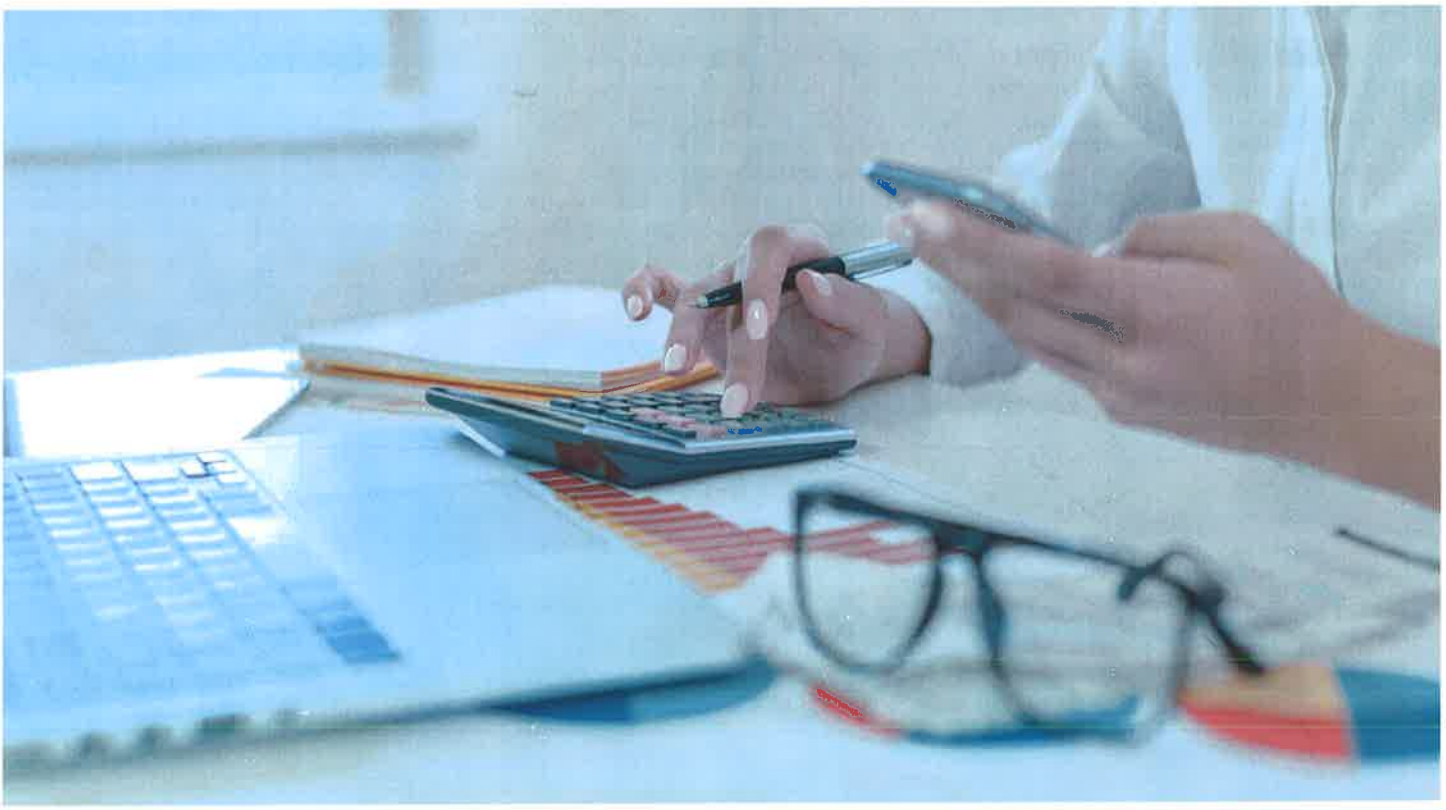

Calculating damages with class

PRESENTING DAMAGES TO THE MEDIATOR IN WAGE-AND-HOUR CLASS ACTIONS

The defense has expressed an interest in resolving your wage-and-hour class and/or representative action. You've agreed on a mediator and set the date for mediation. The focus of the case has shifted from pre-certification discovery to gathering information, documents, and data to present your damages and penalties claims to the mediator.

What information do you need, how do you get it, and, most importantly, how do you go about calculating the damages on behalf of your client and all others similarly situated and/or aggrieved? This article addresses these issues and discusses different approaches to creating a damages model that can optimize your success at mediation.

What do you need?

Class-wide data

The foundational data needed to evaluate damages or penalties in any class or representative action consists of the class size, workweeks, and pay periods during the applicable damages period. The damages period is governed by the statute of limitations for the causes of action alleged in your client's complaint. In a straight wage-and-hour class action, the damages period is three years prior to the filing of the lawsuit to the present. (Code Civ. Proc., § 338.) However, California's Unfair Competition Law ("UCL") can be used to extend the class action recovery period to four years for claims seeking restitution, including claims for unpaid wages, unpaid overtime, meal and rest break premiums, and reimbursement of necessary business expenses. (Bus. & Prof. Code, § 17200, et seq.; *Pineda v. Bank of America* (2010) 50 Cal.4th 1389, 1401.) The penalty period for actions brought under the Private Attorneys General Act of 2004 ("PAGA") is one year prior to the date of filing, plus 65 days for the PAGA notice period. (Code Civ. Proc., § 340; Lab. Code, § 2669.3, subd. (d).)

For the typical Class, PAGA, and UCL action, here is what you must know before mediating: 1) total number of employees during the four-year period; 2) total number of workweeks during the four-year period; 3) total number of employees who were terminated and/or quit during the three-year period; 4) total number of employees during the one-year period; and, 5) total number of pay periods during the one-year period. This information is readily available for most employers, and the defense should provide the requested data without objection or hesitation in any class or representative action that is headed to mediation.

Additional data that will be helpful to your analysis includes: 1) the average

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hourly rate for non-exempt employees; 2) the average hours worked by non-exempt employees each shift; 3) the total number of shifts greater than five, but less than 10 hours; 4) the total number of shifts greater than 10 hours; and, 5) the percentage of shifts that are eight hours or longer. Defendants may be reluctant to provide this information if it's not something they track in the regular course of business. As such, you may need to extrapolate these additional data points independently or with the help of an expert.

Time and wage records

The time and wage records are critical to your damages analysis. They contain evidence of unpaid wages, unpaid premiums, meal and rest break violations, and unlawful timekeeping practices, such as rounding or auto-deductions, among other things. Time and wage records typically consist of handwritten or digital timesheets, wage statements, paystubs, and/or pay summaries.

When asking for the time and wage records, be sure to request them in electronic format, preferably Excel, so that you can search through the records efficiently and, if you know how, utilize macros and formulas to quickly identify search parameters and data points within the records. This will save you and/or your expert a significant amount of time when it comes to analyzing the voluminous records.

If you are given anything other than the actual paystubs employees received each pay period, such as yearly or monthly pay summaries, ask the defense for exemplars of every type of wage statement that was issued during the penalty period so that you can determine what, if anything, was missing from the actual wage statements in violation of Labor Code section 226, subdivision (a).

If the defendant raises any privacy concerns with respect to the time and wage records, offer to stipulate to a protective order or suggest substituting any *identifying information*, like names and social security numbers, with generically assigned employee numbers. If you take the latter approach, the defense must use a consistent and uniform system that allows you to identify and match the time records for any given employee to the corresponding wage statements for that employee.

When dealing with a large class size, the best approach is to agree on a statistically significant random sampling of time and wage records. "The sample relied upon must be representative and the results obtained must be sufficiently reliable to satisfy concerns of fundamental fairness." (*Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, 42.) Moreover, "[a] sample must be randomly selected for its results to be fairly extrapolated to the entire class." (*Id.* at p. 43.) There are many free resources online to help you yield a truly random and statistically significant class size, including calculators that determine acceptable deviations, margins of error, and other statistical factors. One approved method for randomization is to list the employees alphabetically and choose every nth employee to yield the agreed-upon sample size.

Regardless of the sample size, going through the records will be time consuming and costly. Many attorneys don't have the resources to conduct an independent analysis of a large production of time and wage records and agreeing to a smaller sample size may be the most practicable approach. If you agree to a smaller sampling of records, you might consider stipulating that neither side will challenge the representative nature of the sample size used at mediation.

Finally, depending on the Labor Code violations alleged and the fact-specific issues in your case, you may want to request additional documents for each employee selected for the sampling, such as documents regarding final payment of wages, business expense reimbursements, meal period waivers, and/or on-duty meal period agreements.

Written wage-and-hour policies

Poorly written or facially unlawful wage-and-hour policies can significantly bolster your damages calculations. As such, you should demand production of all employee handbooks and stand-alone policies regarding timekeeping, meal and rest breaks, payroll practices, overtime compensation, and expense reimbursements that were in effect at any time during the applicable damages period. Most defendants will produce these policies without hesitation.

Additional materials

The class-wide data, sampling of time and wage records, and written policies and procedures should provide most attorneys, and the mediator, with the framework needed to evaluate damages prior to reaching a reasonable settlement on behalf of the class representative and all others similarly situated and/or aggrieved. For cases that require deeper investigation, consider producing your client for deposition and/or taking the deposition of the defendant's person(s) most knowledgeable regarding its wage-and-hour policies, practices, and procedures. You can also demand a *Belaire-West* administration, which will give you access to putative class members who may provide supporting declarations prior to mediation. (*Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554.)

How do you get it?

Send a letter to the defense outlining the documents, data and/or additional materials you need as soon as the mediation discussion begins. Give yourself enough time to work out an agreement regarding the scope of the exchange and set reasonable production deadlines so that you're not stuck sifting through thousands of pages of time and wage records at the eleventh hour.

While most of what you need can be acquired through formal discovery, an informal exchange is often the most expedient and streamlined method for collecting everything you need to have a meaningful discussion regarding numbers at mediation. That's not to say that you should stop engaging in formal discovery, but an informal exchange offers incentives for the defense to provide evidence that they otherwise wouldn't absent a lengthy meet and confer process, discovery motion practice, and all the delays and unpredictability attendant thereto.

Defendants often ask for a stay on formal discovery until mediation takes

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place. If you do agree to a stay discovery at the defendant's request, inform the mediator so that gaps in the record are weighed in your favor. Remember that regardless of what the defendant agrees to give you informally, the defense will continue to maintain and exploit its unilateral and complete access to employees, witnesses and relevant records. If you are dealing with unsavory defendants or less-than-forthcoming defense counsel, you may want to opt for a *Belaire-West* administration, start speaking with putative class members, collect their sworn declarations if possible, and notice a few depositions before making your appearance at mediation.

Finally, when negotiating the scope of the pre-mediation exchange, keep in mind that a plaintiff's right to statewide discovery is extremely broad in wage-and-hour class and PAGA actions. (*Williams v. Superior Court* (2017) 3 Cal.5th 531.) If the defense is being difficult or resistant, remind them that class action and PAGA settlements are subject to court approval and that, without a reasonable exchange, any settlement reached might not withstand judicial scrutiny during the approval process. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800; Lab. Code, § 2699, subds. (l)(2).)

How do you calculate the damages?

At some point in our careers, we have all heard the adage, *I went to law school because I'm terrible at math*, or words to that effect. Unfortunately, evaluating an employer's exposure in a wage-and-hour class and/or PAGA action requires a fair amount of number crunching. The good news is that there are several options designed to simplify the calculation process without risking rejection during the court approval process.

Class damages – reasonable quantification per workweek

The most streamlined approach to calculating class-wide damages is to multiply the total number of workweeks during the applicable damages period by a reasonable quantifier. The number used for the quantifier depends on the overall strength of your case, which is governed by several factors.

First, review the time records for meal-break violations, i.e., short, late, or missed meal breaks, and compare them with the corresponding wage statements for payment of meal-break premiums. What is a meal-break premium? Well, "[i]f an employer fails to provide an employee a meal... period... the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal... period is not provided." (Lab. Code, § 226.7, subd. (c).) Don't forget to check for second meal periods which must be provided for shifts that are over 10 hours! (Lab. Code, § 512, subd. (a).) A case with a high meal-break violation rate without payment of premiums deserves a higher quantifier per workweek. Note that interruptions to meal periods are not readily apparent on the time records, so your actual violation rate may be higher than that which is shown on the face of the time records.

While reviewing the timesheets, ask yourself if the records evince other unlawful wage-and-hour practices. Are the shifts or lunch breaks rounded or exactly eight hours or 30 minutes, respectively? Is there any indication that meal periods are automatically deducted from the employee's time? If so, you should advocate for a higher quantifier.

Next, look at the written wage-and-hour policies, practices and procedures. Are there any facially unlawful policies? Are the policies bareboned or do they fail to adequately inform employees of their rights and/or the employer's obligations? If the answers to these questions are yes, or the general quality of the employee handbook is poor, you should give your per-workweek quantifier a boost.

Use an expert or staff member to go through the wage statements to determine if the employees were properly paid for all overtime and double-time. If you don't have the resources to go through all the records, do a spot check for unpaid wages and analyze whether any information required under Labor Code section 226, subdivision (a) is missing from the wage statement exemplars. Increase or decrease your quantifier accordingly based on the theories of liability you can substantiate through the pay records.

Speak with your client and/or other putative class members to discover any significant off-the-clock work that was being performed, such as bag checks, preparation of work areas, gathering tools, customer service, clean up, attending training seminars or work meetings, travel time and commuting, or donning and doffing personal protective equipment. Note that the California Supreme Court recently held that the de minimis defense is not applicable to off-the-clock wage-and-hour claims. (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 835.)

Additional factors in assessing the quantifier include the likelihood of success on class certification and the outcome of any depositions taken prior to mediation. For example, if the PMK admits to an unlawful policy that was implemented on a class-wide basis regardless of job title or job location, increase your quantifier. If putative class members have told you that employees were required to be on-call during their rest breaks, uptick the quantifier. Talk to your client to find out everything he or she recalls about the workplace conditions and to assess which Labor Code violations were most prevalent. Assess whether your client will make an adequate class representative. If your client presents poorly, is a poor historian, has a significant disciplinary record, or only worked part time or for a short period, modify your quantifier accordingly.

Class damages – min/max models

A different approach to evaluating damages is to create damages models based on your assessment of the minimum and maximum exposure for each Labor Code violation. The following formulas can be useful to create high/low scenarios in your damages model for some of the main Labor Code violations. The damages periods used below should be reduced to three years if the lawsuit does not include a cause of action for unlawful business practices in violation of the UCL.

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Unpaid minimum wages: (*Total number of workweeks over the four-year period x average hours of unpaid minimum wages per workweek x average minimum wage over the four-year period) x 2.0*. (Lab. Code, §1194.) Note that the amount is doubled because employees are entitled to liquidated damages in the amount of the total unpaid minimum wages. (Lab. Code, § 1194.2.)

Unpaid overtime: T*otal workweeks over the four-year period x average hours of unpaid overtime per week x average overtime premium rate*. (Lab. Code, § 1194.) If the defense does not provide you with the average hourly rate, you can determine that figure by adding all the hourly rates provided in the sampling and dividing that figure by the total number of employees included. The average overtime premium rate is one and one-half times the average hourly rate.

Meal and rest period premiums: T*otal workweeks over the four-year period x average hourly rate x average number of meal/rest break violations per workweek*. (Lab. Code, § 226.7, subd. (c).) When determining the average number of violations per workweek, note that an employee can only collect one meal and one rest period penalty each shift, for a maximum of two premium payments per workday. (*United Parcel Service, Inc. v. Superior Court* (2011) 196 Cal.App.4th 57, 69.)

Wage statement violations: (*$50.00 x total number of employees during the one-year period) + ($100.00 x [total number of pay periods in the one-year period – total number of employees in the one-year period]*). (Lab. Code, § 226, subd. (e).) This formula assumes that there is a wage statement violation each pay period throughout the one-year period. Also, the total damages per employee cannot exceed $4,000.00, so if your average number of pay periods per employee is greater than 40, you can complete the calculation simply by multiplying the total number of employees during the one-year period by $4,000.00.

Waiting time penalties: (*Total number of employees who were terminated or quit during the three-year period) x (30 x average hourly rate x average number of hours worked per work day*). (Lab. Code, § 203.) Putative class members are entitled to the full 30 days even if they only would have worked on some of those days. (See *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492 ["Penalties accrue not only on the days that the employee might have worked, but also on non-workdays."].)

Failure to reimburse business expenses: *Total number of employees during the four-year statutory period x average amount each class member spent on necessary business expenditures*. (Lab. Code, § 2802.)

Pre-judgment interest

Interest!? Yes. "In any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages," at a rate of 10 percent per annum. (Lab. Code, § 218.6; Civ. Code, § 3289.) This includes causes for unpaid minimum and overtime wages in addition to any unpaid premiums for meal/rest break violations. As such, interest rates can and should be included within your damages workup.

Calculating PAGA penalties

PAGA penalties are assessed per pay period for each violation of any code section enumerated in Labor Code section 2699.5. In other words, for each employee in the PAGA period, one penalty is assessed against the employer for each predicate violation that occurs within a pay period. Accordingly, each predicate violation is entitled to its own PAGA penalty calculation.

The PAGA applies a default penalty of $100.00 for initial violations and $200.00 for subsequent violations unless the predicate Labor Code section that has been violated expressly provides for a different civil penalty. (Lab. Code, § 2699, subd. (f)(2).) Some of the common predicate violations subject to the default PAGA penalty include failure to provide meal and/or rest break *premiums*, failure to pay all wages owed *during* employment and failure to reimburse necessary business expenses. Failure to pay overtime, failure to provide meal breaks and failure to provide rest breaks carry an initial PAGA penalty of $50.00, and a subsequent penalty of $100.00. (Lab. Code, § 558, subds. (a)(1)-(2).) Failure to pay minimum wages *during* employment gets $100.00 for the initial penalty and $250.00 for subsequent violations. (Lab. Code, § 1197.1, subds. (a)(1)-(2).) Wage statement violations arguably are calculated at a rate of $250.00 for the initial violation, and $1,000.00 for every subsequent violation thereafter! (Lab. Code, § 226.3; *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 680.)

The formula used to calculate PAGA penalties is therefore the same regardless of the predicate violation: *(Initial violation penalty x total number of employees in the one-year period) + (subsequent violation penalty x [total number of pay periods in the one-year period – total number of employees in the one-year period])*. This formula assumes that the predicate violation occurs at least once per pay period. If the employer's violation rate is anything less than once per pay period, you should modify the formula to reflect your estimated violation rate. For example, if the predicate violation occurs every other pay period, decrease the total penalty amount for subsequent violations by half.

Special considerations regarding PAGA penalties

First, the PAGA provides two tiers of civil penalties – an amount for an initial violation and an amount for a subsequent violation. In *Amaral v. Cintas Corp.*, the California Court of Appeal held that a subsequent violation does not trigger until "the employer has learned that its conduct violates the Labor Code." (*Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1209.) Many defendants interpret the *Amaral* decision narrowly to stand for the position that subsequent violations do not trigger until a court or the Labor Commissioner gives notice of the violation to the employer. When faced with this argument, plaintiffs can point to the PAGA notice, prior employee complaints, prior lawsuits, internal or third-party payroll audits, the employer's retention of third-party human resource agencies, or any other evidence that shows the employer acted willfully or had knowledge of the Labor Code violations in the workplace.

Second, while a court cannot reduce the amount of penalties assessed against the employer to zero, courts do have

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discretion to "award a lesser amount than the maximum civil penalty amount if... to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Lab. Code, § 2699, subd. (e)(2).)

Third, there is some uncertainty as to whether multiple predicate violations, and the penalties related thereto, can be stacked each period or if only one penalty can be assessed each pay period regardless of how many predicate violations occurred during that same pay period. Fortunately, there are several federal cases which hold that PAGA penalties can be stacked. (*Hernandez v. Towne Park, Ltd.* (C.D. Cal. 2012) 2012 WL 2373372 at *17; *Schiller v. David's Bridal, Inc.* (E.D. Cal. 2010) 2010 WL 2793650 at *6; *Smith v. Brinker Int'l, Inc.* (N.D. Cal. 2010) 2010 WL 1838726 at **2-6.)

Fourth, there is currently a split in the courts as to whether aggrieved employees can recover unpaid wages as a *civil penalty* under the PAGA. "In our view, the language of section 558, subdivision (a), is more reasonably construed as providing a civil penalty that consists of both the $50 or $100 penalty amount and any underpaid wages." (*Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1145; see also, *Lawson v. ZB, N.A.* (2017) 18 Cal.App.5th 705, 724.)

Fifth, paying meal period premiums under Labor Code section 226.7 does not excuse the failure to *provide* the meal period. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1256.) Thus, even if an employer issues premiums for meal-period violations, you can still assess PAGA penalties for the violation of Labor Code section 512.

Finally, the Industrial Welfare Commission, known as the "IWC," is a "commission made up of five members appointed by the Governor with the consent of the Senate, that is responsible for setting the wages, hours of work, and working conditions of California employees." (www.dir.ca.gov). The Industrial Welfare Commission issues orders regulating the wages, hours, and working conditions in certain industries or occupations. (*Ibid.*) The IWC is currently not in operation, but the Division of Labor Standards Enforcement (DLSE) continues to enforce the provisions of the wage orders. (*Ibid.*) There are 17 such orders that are also known as "IWC Orders," or "Wage Orders." (*Ibid.*) The wage orders can be found online at the Department of Industrial Relations public website. The PAGA does not create a private right of action to directly enforce a wage order but "PAGA actions can serve to indirectly enforce certain wage order provisions by enforcing statutes that require compliance with wage orders." (*Thurman, supra,* 203 Cal.App.4th, at p. 1132.) For example, PAGA plaintiffs can seek penalties under Labor Code section 1198 for violations of any IWC Wage Order that regulates conditions of labor. (*Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 223-24.) As such, practitioners should review the applicable wage orders to assess whether additional penalties can be levied against the employer for violations extending beyond those enumerated in Labor Code section 2699.5.

Arya Rhodes is an attorney at Schimmel & Parks, APLC, *a law firm focusing on employment law, consumer class actions, rehab facility wrongful death, sexual assault and harassment, fires, mass torts, construction defects, and insurance bad-faith litigation. Mr. Rhodes has successfully represented thousands of employees individually and on a class-wide basis in actions arising out of the FEHA and Labor Code. Mr. Rhodes completed his fellowship with the Los Angeles Chapter of the American Board of Trial Advocates, and he graduated magna cum laude from Southwestern Law School. He can be reached at arhodes@spattorneys.com.*