Does PAGA Have Wings? Bernstein's Threat to Interstate Airlines

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California's Private Attorney's General Act ("PAGA") has created an extremely friendly litigation environment for employees in California. While the 2021 Ninth Circuit decision in *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127 (9th Cir. 2021)(*Bernstein*) was a win for employers on subsequent violation liability, *Bernstein's* analysis of the potential extension of California labor regulations to employees of interstate airlines warrants a note of caution. Specifically, an airline or other interstate employer with sufficient connections to the state of California (and especially with no greater connection to any other particular state) may be subject to many significant California wage and hour laws—even when employees are physically working outside the state. PAGA could provide a way to geographically extend the enforcement of California labor laws in these circumstances.

Background on the PAGA

In 2003, California enacted PAGA in response to a concern that the state could not adequately enforce its labor code through its administrative agency amid the rapid expansion of the workforce. PAGA does not create additional obligations on employers but is another way for employees to get into Court. The legislature deputized "aggrieved employees" to act as private attorney generals with the ability to file a lawsuit against their employers for a violation of essentially any section of the California Labor Code, regardless of whether that section carries a private right of action. An employee filing a PAGA claim acts as a representative of other similarly aggrieved employees and sues on behalf of the state. A PAGA action provides for default penalties of $100 for each violation of the Labor Code for each pay period and $200 for subsequent violations (unless a penalty is stated in the section). The state recovers 75% of the proceeds, and 25% goes to the aggrieved employees. PAGA cases have grown exponentially since 2013, and the state, employees, and their attorneys have recovered tremendous sums under PAGA. While other states have considered similar legislation, PAGA remains unique to the Golden State.

As interpreted by California courts, PAGA has developed some very employee-friendly aspects since its enactment. Most crucially, PAGA claims are not subject to an employee's arbitration agreement or class action waiver (although the U.S. Supreme Court is currently deciding this issue in *Viking River Cruises v. Moriana*). PAGA lawsuits are also considered "representative actions," not class actions, so a PAGA plaintiff does not need to satisfy class action requirements of typicality, numerosity, etc. PAGA has also relaxed standing requirements. A PAGA representative employee may pursue multiple Labor Code violations but need only have suffered one of the alleged violations, so long as other aggrieved employees have. An aggrieved employee may even pursue a PAGA claim despite having settled their own individual claims under the Labor Code. The employer-friendly aspects of PAGA are an administrative exhaustion requirement with limited cure rights and a one-year statute of limitations.

Bernstein v. Virgin America

The U.S. Court of Appeals for the Ninth Circuit applied California Labor Code wage-and-hour sections—including the PAGA—to flight attendants working for an inter-state airline who were based in California. In *Bernstein*, a group of Virgin America flight attendants brought class action claims under California's wage and hour laws, including meal and rest breaks, minimum and overtime wages, final payment and wage statement laws, and the district court certified a class of all California-based flight attendants of Virgin America.

Both Virgin America and the *Bernstein* class had connections to California and, most importantly, had no greater connection to any other one state. The vast majority of Virgin flights had some connection to California; the daily percentage of Virgin's flights that arrived in or departed from

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California airports was never under 88% in a year. The class members spent only 31.5% of their time working within California's borders but did not spend more than 50% of their time working in any one state and did not work in any other state more than they worked in California.

Bernstein held that the dormant Commerce Clause did not bar applying the California Labor Code to interstate employers, partly because Virgin could not identify any other state's labor laws that applied. Additionally, certain federal statutes (Federal Aviation Act or the Airline Deregulation Act) did not preempt the California Labor Code's meal break and rest break rules for interstate employers operating across state lines. In doing so, the 9th Circuit disregarded Supreme Court precedent and applied a more restrictive test that limits federal preemption to only state laws that bind airlines to a particular price, route, or service. The Court also held that California's technical law on wage statements and final pay rules carrying 30 days waiting time for late paid wages also applied.

Sullivan v. Oracle Corp., 51 Cal.4th 1191 (2011)(*Sullivan*) established that California's overtime law section applied to non-California residents who performed work in California for a California-based employer, but only for work physically performed in the state. *Bernstein* addressed a converse question: Did California overtime law apply to these flight attendants who were California-based but spent the majority of their working hours *outside* of California? *Bernstein* applied *Sullivan* and agreed it did. But it expanded *Sullivan* to work outside of California, holding "the principles set forth in *Sullivan* require us to apply California overtime law to California residents' out-of-state work."

The *Bernstein* Court explained, "[t]o permit nonresidents to work in California without the protection of our overtime law would completely sacrifice, as to those employees, the state's important public policy goals of protecting health and safety and preventing the evils associated with overwork.[1] The same public policy goals would be thwarted by permitting residents to work outside of California for a California employer without the protection of its overtime law."[2] This appears to contradict *Sullivan*, as that decision was careful to explain that overtime law did *not* follow California residents wherever they go throughout the United States.[3] The California Supreme Court has made clear that the application of California wage and hour protections to nonresident employees vary on a statute-by-statute basis,[4] and meal and rest breaks laws have not yet been analyzed in this context.

The *Bernstein* court did not separately analyze whether PAGA applies but held that because Virgin was not previously notified by the Labor Commissioner or any court of any California Labor Code violations, there could be no heightened, second-tier penalties for subsequent violations of the Labor Code under PAGA. While a welcome result for employers, the outcome was not an outlier. Similar rulings had been made by California state courts in similar circumstances but has not been definitively addressed yet by the California Supreme Court.

Though commenters have been critical of *Bernstein, there has been no case law narrowing the decision as of this writing*.

Conclusion

Bernstein raises concerns about the extent to which, for example, California meal, rest, and overtime laws can be applied to work hours performed out of state. That would certainly be a broad extension of California's labor regulations and not necessarily supported by California authority, let alone *Sullivan.* Nevertheless, *Bernstein's* analysis may encourage an artful plaintiff to make the effort under PAGA.

[1] *Sullivan* at 1205.

[2] *Bernstein* at 1138-1139.

[3] *Sullivan*, 51 Cal. 4th at 1198.

[4] *See Ward v. United Airlines, Inc.*, 9 Cal. 5th 732 (2020); *Oman v. Delta Air Lines, Inc.*, 9 Cal. 5th 762 (2020)