

# California Supreme Court Rejects Claim for Unpaid Wages under PAGA

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Putting an end to employees' backdoor attempts to recover unpaid wages in Private Attorneys General Act-only actions under California Labor Code Section 558, the California Supreme Court has ruled against allowing such claims. [ZB, N.A., et al. v. Superior Court](#), No. S246711 (Sept. 12, 2019).

This is surprising, as the Court provided this much-needed guidance on its own in a case where the question originally presented was whether claims for unpaid wages under Section 558 could be compelled to arbitration.

## Background

The plaintiff, Kalethia Lawson, sued her former employer alleging failure to pay overtime and minimum wages, failure to provide meal and rest periods, failure to timely pay wages, failure to provide accurate wage statements, and failure to reimburse business expenses. Following a recent trend in employment litigation since the U.S. Supreme Court's 2018 *Epic Systems Corp. v. Lewis*, which rejected challenges to class action waivers in employment arbitration agreements, Lawson's complaint contained a single cause of action under California's Private Attorneys General Act (PAGA) for alleged Labor Code violations, claims that arguably would not be subject to arbitration under California law. However, Lawson's complaint sought "civil penalties [], including unpaid wages and premium wages per California Labor Code section 558."

Labor Code Section 558 provides for \$50.00 and \$100.00 "for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover underpaid wages.*" Labor Code § 558(a) (emphasis added).

The defendants, ZB, N.A. and Zions Bancorporation ("ZB"), moved to compel arbitration of Lawson's Section 558 claim for unpaid wages and to stay the civil action. The trial court granted the

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motion, but it also compelled to arbitration “as a representative action” the unpaid wages of all allegedly aggrieved employees.

ZB filed both an appeal and a writ for mandate from the trial court’s order. The appellate court issued a writ, stating that Lawson’s claim for unpaid wages under Section 558 could not be arbitrated. The appellate court held the “wages” recoverable under Section 558 fell within the scope of a civil penalty, and therefore a PAGA claim under Section 558 could not be arbitrated, citing *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014).

ZB petitioned the California Supreme Court to determine whether an employer may compel arbitration of a PAGA claim seeking unpaid wages under Section 558. Before addressing that question, the Court decided to address a “more fundamental question”: whether employees can file a PAGA-only civil complaint that includes a request for unpaid wages under Section 558?

## California Supreme Court’s Analysis

The Court began its analysis by examining the history of Section 558 and PAGA. Labor Code Section 558 was enacted as part of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. As originally written, the Act enabled the California Labor Commissioner to collect civil penalties and unpaid wages from employers. PAGA allows employees to recover civil penalties on behalf of themselves and other employees that previously were recoverable only by the Labor Commissioner, including the civil penalties in Section 558.

The issue, therefore, was whether the employee-specific “underpaid wages” amount in Section 558 “is the kind of ‘civil penalty’ the PAGA and *Iskanian* contemplated the employee pursuing on the state’s behalf — and whose recovery *Iskanian* thus immunized from predispute waivers in arbitration agreements.” In other words, may an employee bring a PAGA action to collect *both* civil penalties *and* unpaid wages under Section 558?

ZB argued the unpaid wages should be viewed either as a “nontraditional penalty” that can be compelled to arbitration or as compensatory damages. Lawson conceded that Section 558 did not have a private right of action, but she argued she could seek unpaid wages as a “civil penalty” through PAGA.

The Court partly agreed with each side. It agreed with Lawson that Section 558 does not have a private right of action. It also agreed with ZB that unpaid wages are compensatory damages that can be ordered only by the Labor Commissioner. The Court compared Section 558 to Labor Code Section 1197.1, which allows the Labor Commissioner to issue a citation that includes a fixed component and underpaid wages component. Further, the Court noted, to classify an employee’s unpaid wages as penalties available under PAGA would require 75 percent of the employee’s wages be paid to the California Labor and Workforce Development Agency (LWDA). That result would be inconsistent with Section 558(a)(3), which provides that all recovered wages will be paid to the affected employee.

Interestingly, the Court also noted that the “vast majority” of civil penalties in California’s Labor Code are “fixed, arbitration amount[s],” like the \$50.00 and \$100.00 penalties in Section 558 and the \$100.00 and \$200.00 penalties under PAGA. The “underpaid wages” language is more like the restitution of wages in Section 1197.1 than those civil penalties, it said. The Court was further unpersuaded by Lawson’s argument that unpaid wages should be considered a civil penalty just because liability may have an “incidental behavior-shaping purpose.”

## California Supreme Court's Conclusion

Because the unpaid wages provided for by Section 558 are not penalties and because Section 558 does not contain a private right of action, Lawson could not recover her wages or any aggrieved employees' wages under Section 558 and PAGA. On these grounds, the Court affirmed the order denying ZB's motion to compel arbitration, and remanded the case to the trial court to determine whether to strike Lawson's unpaid wage claim under Section 558, or to grant her leave to amend, closing the door on a recent split in authority on whether a PAGA claim, with a claim for unpaid wages under Section 558, could be compelled to arbitration.

## Takeaways for Employers

This case should put an end to the latest litigation tactic of using PAGA-only cases to recover unpaid wages to avoid arbitration and class actions. Employees will be required to seek unpaid wages through an individual claim, class action, or by filing an administrative charge with the California Labor Commissioner and requesting a *Berman* hearing. Employers who want to resolve these types of claims in arbitration should ensure their arbitration agreements are fully enforceable and expressly cover individual, class, and administrative claims.

This case may have the most significant effect on alleged misclassification cases, where the unpaid wage component can be substantial. For other PAGA-only cases, the distinction may be less notable as the amount of unpaid wages may pale in comparison to alleged PAGA penalties available under the California Labor Code.

Finally, this case highlights the risk employers face when a PAGA-only case proceeds on a separate track from the employee's individual wage claims. This case identifies the concern that attorneys may use a PAGA-only case as a vehicle to obtain a pro-employee judgment and then use issue preclusion to obtain favorable rulings for non-party employees' wage claims on an individual or class-wide basis.

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