

LOOKING AHEAD

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AM I LOOKING AT THIS RIGHT? Evaluating California Class Actions and PAGA Actions From All Perspectives

California Wage & Hour Hybrid Class/PAGA Action Settlement Trends in 2018*

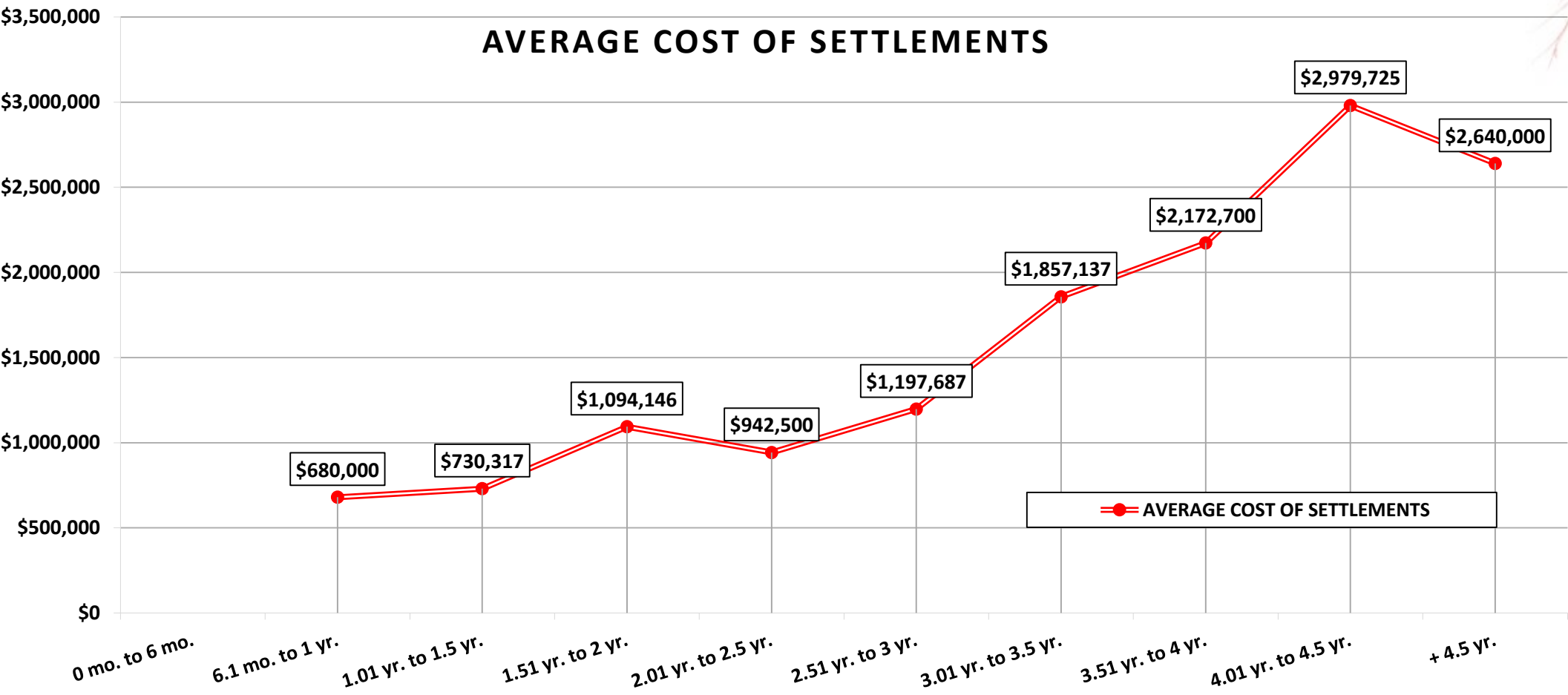
- > Average amount of settlement: \$1.36 million
 - > Max \$6.5 million; Min \$25,000
- > Average amount to LWDA: \$29,000
 - > Max \$502,139; Min \$750
- > Settlement venue:
 - > LASC (69%)
 - > By Hon. Carolyn Kuhl (36%)
 - > Hon. Kenneth Freeman (20%)
 - > San Bernardino County (19%)
 - > Ventura County (8%)

*Data from published Verdicts and Settlements

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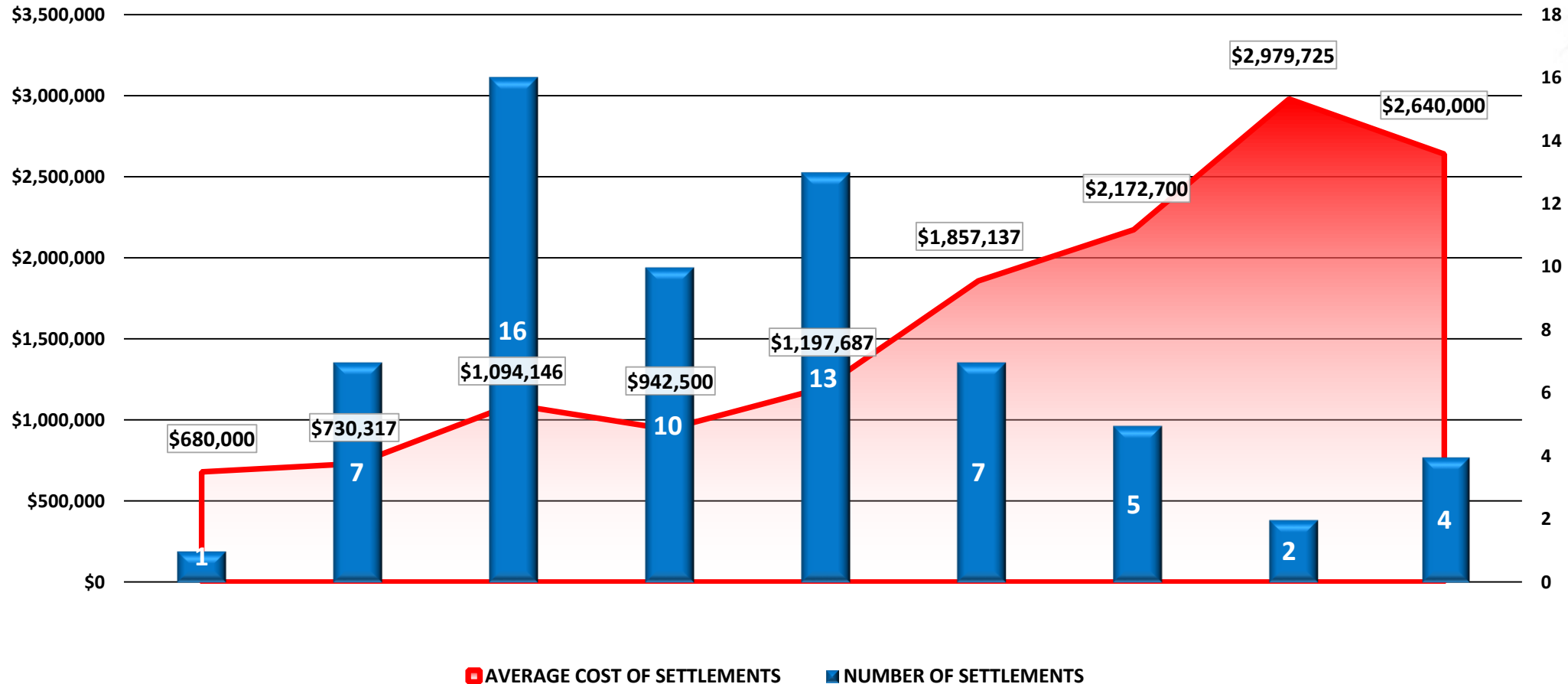
- > Average life of case until final approval: 2.6 years
 - > Max 5.7 years; Min 10.5 months
 - > Includes preliminary and final approval period

California Wage & Hour Hybrid Class/PAGA Action Settlement Trends in 2018*



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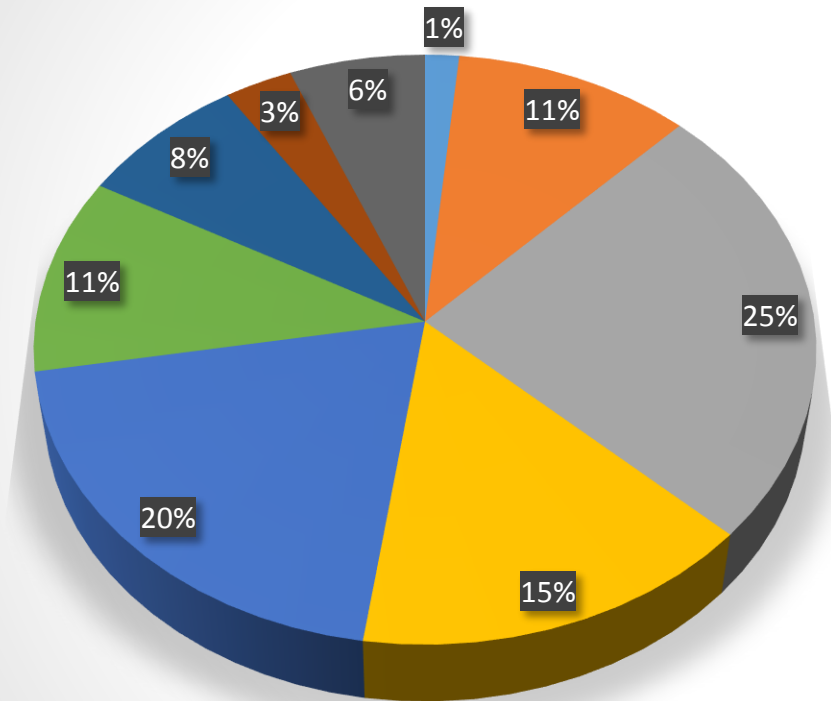
California Wage & Hour Hybrid Class/PAGA Action Settlement Trends in 2018*



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California Wage & Hour Hybrid Class/PAGA Action Settlement Trends in 2018*

Percent of Time to Settle



- 6.1 mo. to 1 yr.
- 1.01 yr. to 1.5 yr.
- 1.51 yr. to 2 yr.
- 2.01 yr. to 2.5 yr.
- 2.51 yr. to 3 yr.
- 3.01 yr. to 3.5 yr.
- 3.51 yr. to 4 yr.
- 4.01 yr. to 4.5 yr.
- + 4.5 yr.

California Wage & Hour Hybrid Class/PAGA Action Settlement Trends in 2018*

- > Average amount of plaintiff attorney's fees: \$460,000
 - > Lawyers for Justice - \$4.3 million
 - > Matern Law Group - \$3.8 million
 - > Nourmand Law Firm - \$3.6 million
 - > Lavi & Ebrahimian - \$2.3 million
 - > Haines Law Group - \$1.9 million
 - > All are one of top 30 PAGA notice filers in the state

*Data from published Verdicts and Settlements

California Wage & Hour Hybrid Class/PAGA Action Settlement Trends in 2018

- > Trial verdicts:
 - > \$870,834 damages / \$1.3 million attorney's fees / \$12,800 to LWDA
 - > Northern District of California
 - > Contested fee motion; plaintiff's attorney sought \$2.1 million in fees
 - > \$372,794 damages / \$275,677 attorney's fees / \$29,063 to LWDA
 - > San Diego
 - > Individual action

Tools and Strategies to Deflect Employment Class Actions

- > Foremost deflectors continue to be:
 - > Collective Bargaining Agreements
 - > CBA must provide for substantially similar rights afforded to employees by overtime and meal and rest period laws



Tools and Strategies to Deflect Employment Class Actions

- > Arbitration agreements with class action waivers
- > Stand-alone class waivers



Tools and Strategies to Deflect PAGA Actions

- > Request for personnel file request should cue preparations
 - > Review wage statements
 - > Assess violative meal breaks
 - > Assess final pay violations
 - > Assess procedures implementing alternative workweek schedule
 - > Review timeclock and payroll policies, such as rounding, calculations of regular rate of pay
 - > Review uniform/appearance policies



Tools and Strategies to Deflect PAGA Actions

- > Right to cure two types of wage statement violations:
 1. Missing pay period begin and end dates (Labor Code § 226(a)(6))
 2. The name and address of the employing legal entity (Labor Code § 226(a)(8))

Tools and Strategies to Deflect PAGA Actions

- > Employers have 33 days from the date of the notice to “cure” wage statement violations
- > Corrected and “fully compliant” wage statements must be provided to “each aggrieved employee for each pay period for the three-year period prior to the date of the written notice” within 33 days (Labor Code § 2699(d))
- > Notice of cure that includes a “description of actions taken” must be filed online with the LWDA at <https://dir.tfaforms.net/192>, with a copy sent by certified mail to the aggrieved employee or their representative
- > If the wage statement violations have been cured, “no civil action pursuant to Section 2699 may commence” (Labor Code § 2699.3(c)(2)(A))
 - > Overzealous plaintiff counsel who refuses to acknowledge the cure may be subject to Code of Civil Procedure § 128.7 sanctions if they nonetheless file a PAGA action

Tools and Strategies to Deflect PAGA Actions

> Preemptive cure? No. However:

Do ready your resources to be able to execute the cure process within 33 days.
This includes:

- ✓ Coordinating with payroll provider for:
 - > The types of information that need to be corrected on the wage statement
 - > This includes other wage statement violations that are not subject to the cure provision, such as total hours worked, employee ID or last four digits of SS#, and applicable hourly rates
 - > The amount of time the payroll provider needs to generate the corrected wage statements
- ✓ Compile a list of the addresses of the current and former employees during the three-year period
- ✓ Predesignating a team that will be familiar with the logistics and requirements

Tools and Strategies to Deflect PAGA Actions

- > Can't wait? Check PAGA database. Can be searched by employer, employee, filing firm at <https://cadir.secure.force.com/PagaSearch/>
- > Best practice is to go beyond the wage statement and correct any potential wage violation identified in the PAGA notice to avoid accruing penalties

Tools and Strategies to Deflect Class or PAGA Actions

- > But a “cure” may create an argument that belated payment constitutes an implied admission of a violation
 - > While Evidence Code § 1152 vitiates such claim, but less certain in the PAGA penalty context
- > True-ups of wages in exchange for putative class member release is advisable only before notice of a potential class action
 - > After the lawsuit, employers must meet strict disclosure requirements when communicating to putative class members about a release
 - > After certification, communication with class members is not allowed as they are represented parties

Tools and Strategies to Deflect Class or PAGA Actions

- > If there is no class waiver, a PAGA notice is a preview of class claims
 - > If company has never paid meal period premiums during the class period, payment of premiums should be considered for shifts greater than 5-6 hours with a meal punch that is missing, short, or late
 - > Indisputable ongoing minimum wage violations should be corrected immediately

A Note About Employee Personnel File Request

- > Scope of an employee's personnel file
- > Avoid retaining a copy of the Employee Handbook in the personnel file
- > Avoid language in personnel file documents that explicitly refer to the Employee Handbook or other company policies/practices/procedures
 - > Example: "Please see Uniform Policy—001 for details about ACME's Appearance Policy."
- > The right to inspect personnel files does not apply to an employee covered by a CBA if the agreement expressly provides for a procedure for the inspection and copying of personnel records

A Note About Employee Personnel File Request

- > Employee personnel file request means company is being investigated
- > Counter-investigation strategies:
 - > Employees should be encouraged to immediately report any outside contact inquiring about employment conditions, wages and hours, etc.
 - > Social media, especially Facebook, should be checked regularly for advertising, posts, threads, etc.
 - > Thorough background check of plaintiff is essential

Class/PAGA Litigation Strategies

- > Death by a thousand cuts
 - > Determine early on whether any claim fails as a matter of law
 - > Determine early on whether any issues are subject to summary judgment
 - > Demand specificity of company-wide practice/policy that resulted in the wage and hour violation
- > Aggressive, scorched-earth litigation strategy is particularly effective against smaller firms who do not have the resources to withstand the continuous volleys

Class/PAGA Litigation Strategies

- > Fight to limit discovery, especially in federal court
 - > Most courts will limit production of time and wage records to a sample
 - > Preserve challenge to representativeness of sample
- > Demand the “what” and “why” behind plaintiff’s document requests
 - > Force plaintiff’s counsel to describe the type of documents sought
 - > Force plaintiff’s counsel to explain the relevance of a particular type of document/information
- > Depose plaintiff
 - > Deposition can be a valuable tool to undermine plaintiff’s case

Class/PAGA Litigation Strategies

- > Data dump
 - > Permitted so long as they are produced in the manner in which they are maintained.
 - > If data is not kept in a form that is searchable or manipulable, such as Excel, then produce a scanned image of data
 - > But information provided does need to be usable, which will be up to the plaintiff counsel to raise during meet and confer

Class/PAGA Litigation Strategies

- > Delay, delay, and delay some more
- > Psychology of pleading poverty without claiming financial hardship
 - > Caps Plaintiff counsel's expectations with respect to discovery and settlement value

Plaintiff's Valuation of Class/PAGA Claims

- > Wage Statement Violation – High Value
 - > Class: \$50 initial/\$100 subsequent violation per pay period, up to max of \$4,000 per employee
 - > Showing of injury required, except the following information that cannot be “promptly and easily” determined:
 - > Total hours worked
 - > Number of piece-rate units earned
 - > Deductions
 - > Inclusive dates of pay period
 - > All applicable hourly rates and corresponding hours worked at each hourly rate
 - > PAGA: \$250/\$1,000
 - > Penalty scheme applies for any violation of Labor Code § 226(a) without showing of injury

Plaintiff's Valuation of Class/PAGA Claims

- > Rest Period Premiums – High Value
 - > Class: measured at the regular rate of pay; multiplier can be every work day for each employee if based on a company-wide policy, such as one requiring on-premises rest breaks
 - > PAGA: \$100/\$200; multiplier can be all pay periods worked by all nonexempt employees
- > Meal period premiums – High Value
 - > Class: measured at the regular rate of pay
 - > PAGA: \$100/200; multiplier can be all pay periods worked by all nonexempt employees

Plaintiff's Valuation of Class/PAGA Claims

- > Failure To Pay Wages at Termination/Waiting Time Penalties – High Value
 - > Class: measured at employee's daily rate of pay with a maximum multiplier of 30 days employee was not paid
 - > PAGA: \$100/200; 3 maximum pay periods
- > Regular Rate Violation – High Value
 - > Class: measured by the difference of a regular rate of pay incorporating a nondiscretionary bonus, such as a shift differential pay
 - > PAGA: \$100/200; multiplier can be all pay periods worked by all nonexempt employees

Plaintiff's Valuation of Class/PAGA Claims

- > Business Expenses – Medium Value
 - > Class: measured by the expense incurred and/or the cost of maintenance
 - > Failure to compensate for uniform maintenance can be valuable since it gives rise to a host of derivative claims
 - > PAGA: \$100/\$200; multiplier should be the pay period in which employee incurred expense and/or cost

Plaintiff's Valuation of Class/PAGA Claims

- > Underpaid overtime and minimum wages – Low Value
 - > Class: measured by the underpaid wages
 - > PAGA: \$100/\$200; multiplier should be the pay period in which wages were earned but were underpaid
 - > Note, unpaid overtime gives rise of liquidated damages in an amount equal to the unpaid wages
 - > Overtime claims based on improperly implemented alternative workweek schedules carries greater value since every 9th and 10th hour worked by all employees on the AWS is deemed to be underpaid overtime wages

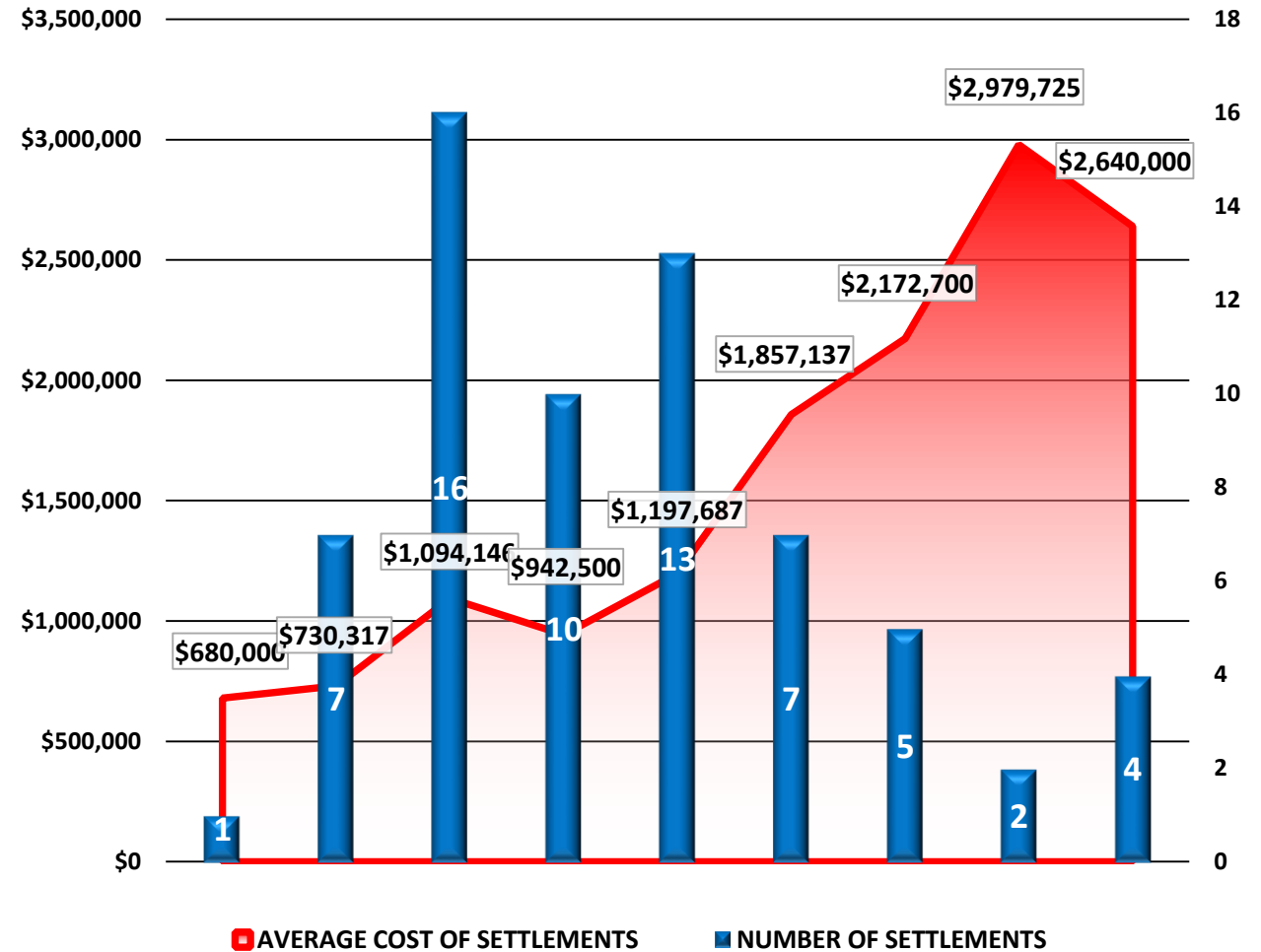
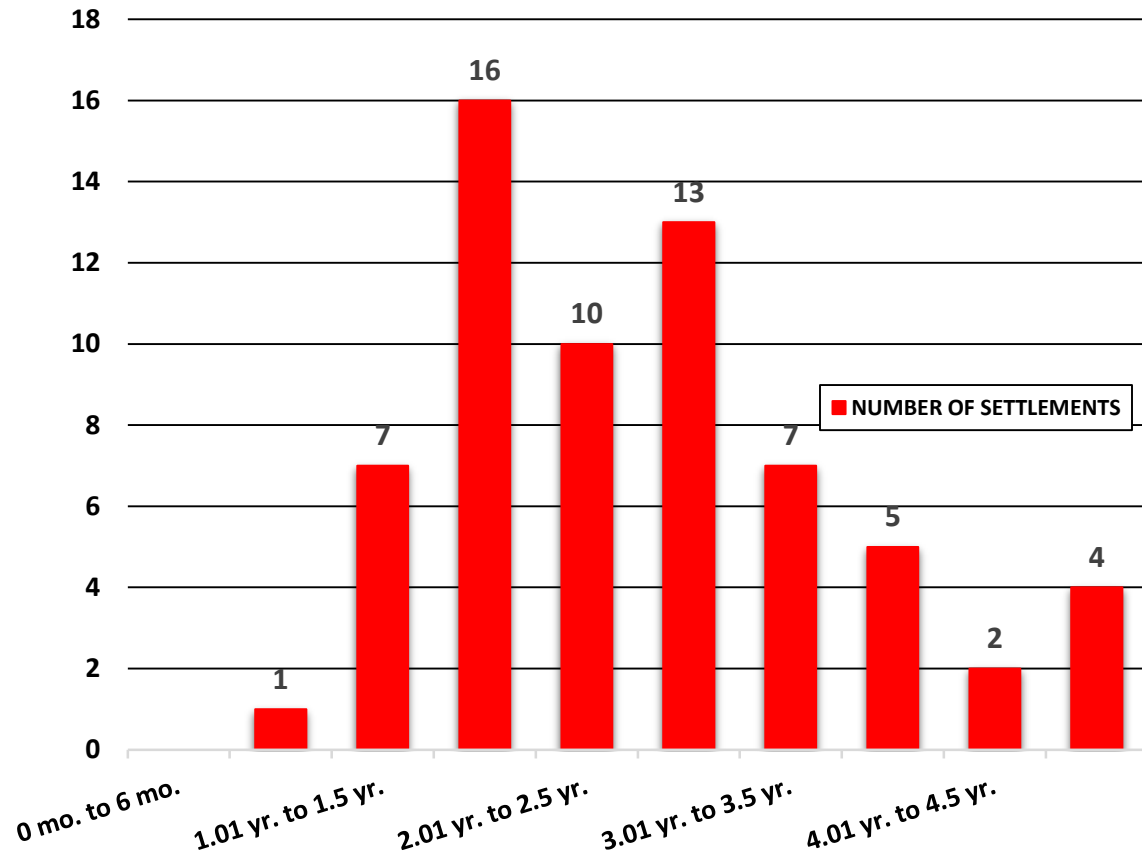
Plaintiff's Valuation of Class/PAGA Claims

- > Labor Code § 558 claim
 - > Class: measured at \$50/\$100 plus underpaid wages if pleaded in complaint
 - > PAGA: \$50/\$100 + underpaid wages
 - > Unpaid wages claim under § 558, either as a class or PAGA claim, is arbitrable under *Esparza v. KS Industries* because the wage portion of a § 558 civil penalty is not allocated to the state
 - > But, California's Fifth District Court of Appeal in *Lawson v. ZB, N.A.* (review granted, S246711 (March 21, 2018)), disagreed with *Esparza*, holding that a § 558 claim for civil penalties sought through PAGA is not divisible and therefore not subject to arbitration
 - > If arbitration agreement with class waiver is present, then § 558 remedies is recoverable by plaintiff only

Plaintiff's Valuation of Class/PAGA Claims

- > When does plaintiff devise an exit strategy?
 - > Insolvent defendant
 - > Attorney's fees and expenses incurred dwarf likely recovery
 - > Financial difficulty of plaintiff counsel
 - > How to tell?
 - > Gauge response to an individual settlement leaving open the possibility of separately-paid attorney's fees
 - > Generally receptive to individual settlement after notable litigation losses

Settlement Strategy



LOOKING AHEAD

Settlement Strategy

- > Highest concentration of settlements between 1.5 and 2 years
- > Average settlement hovers \$1 million between 1.5 to 2.5 years

Settlement Strategy

- > Early settlement?
 - > Individual settlement offers at the nascent stage of case almost never work
 - > Puts the adequacy of plaintiff's counsel in question
 - > Court may be unwilling to dismiss class claims
- > Early mediation?
 - > Non-negotiable condition to early mediation should be a stay of formal discovery sans stay of the entire action to allow the five-year clock to continue running

Closing Observations

- > Friendly, but aggressive approach to litigation is best to decrease the case value
- > Gain cooperation from plaintiff's counsel
- > Win discovery battles
- > Chip away at plaintiff's claims
- > Help shape plaintiff counsel's valuation of claims
- > Keep PAGA recovery low
- > Test trial manageability before PAGA-hostile judge

FINAL QUESTIONS



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THANK YOU

FOR JOINING US

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