



A New Wave in the Workplace Law

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Managing, Calculating, and Internally Communicating Risk Stemming From the New Tsunami of PAGA Lawsuits in California

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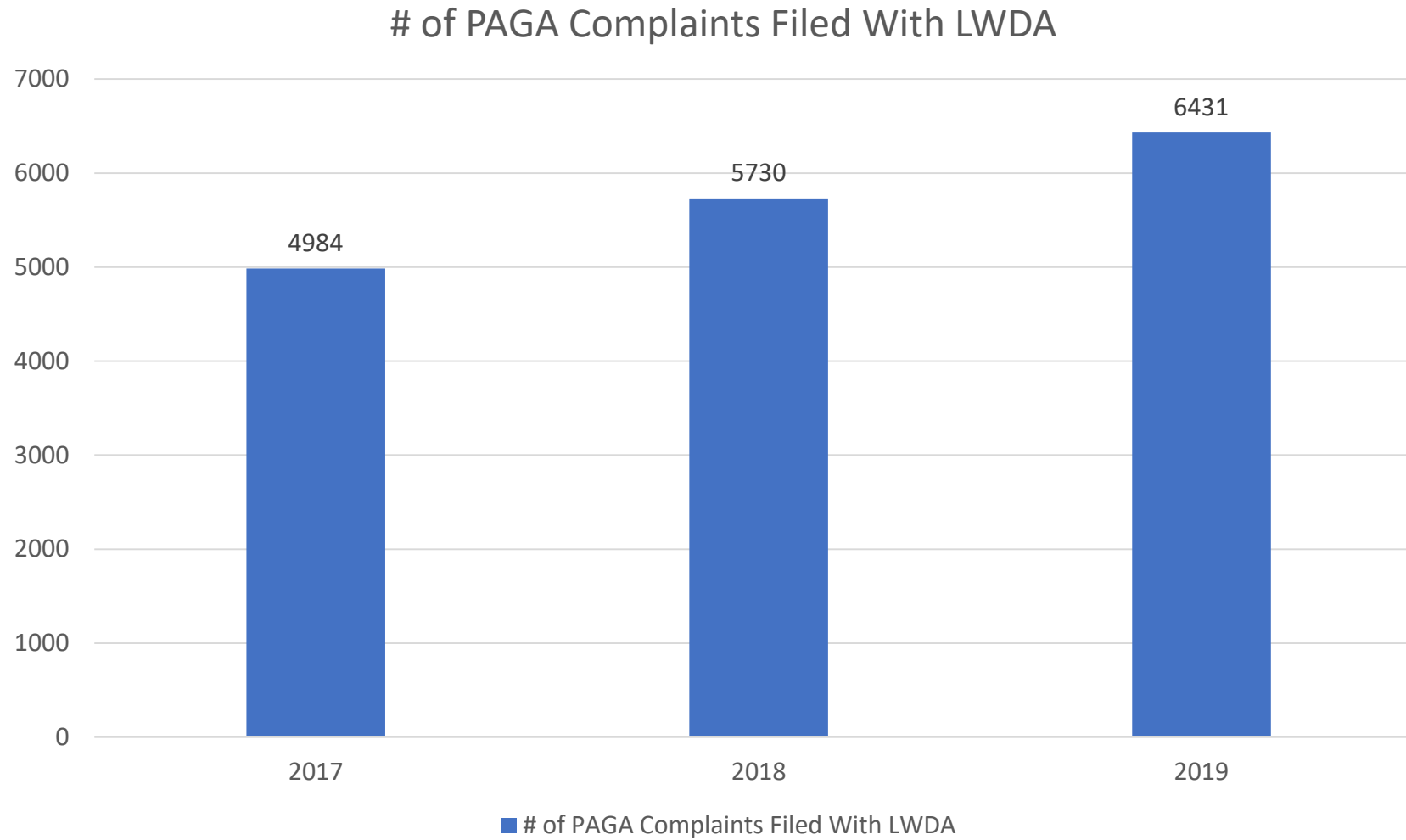
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Introduction

- California continues to see a significant increase in the number of representative actions filed under the Private Attorneys General Act (“PAGA”)
- The increase in quantity of PAGA lawsuits, average settlement amount and litigation duration result from many different factors:
 - Implementation and enforcement of pre-dispute arbitration agreements with class-action waivers;
 - Difficulty in certification based upon policies that are compliant with *Brinker* v. no certification requirements in PAGA cases;
 - Avoidance of Rule 23 requirements in federal court; and
 - Reluctance to litigate cases in federal court due to multiple reasons (e.g. discovery requirements, lower percentage of gross settlement amount approved as attorneys’ fees)

Introduction



Introduction

- Risk prevention and mitigation is dependent on five key factors:
 - Auditing not only policies, but processes within California worksites;
 - Analyzing time records to identify frequency of facially non-compliant time records;
 - Implementing systems for employees to voice concerns about failure to be provided meal and rest periods, and also distinct pay codes to pay out such premiums;
 - Review of payroll formulas for rounding, overtime calculation and meal/rest period premiums; and
 - Educating decision-makers on the risk and liability associated with various levels of actual or potential non-compliance.

Introduction

- Today's presentation seeks to provide you with:
 - Developing claim trends;
 - Developing legal trends;
 - Developing claim assessment trends;
 - Recommendations on internal dialogue on case handling; and
 - Strategy and defenses for handling PAGA claims.

Developing Claim Trend: Meal and Rest Periods

- The most frequent cited labor law violation, in PAGA administrative complaints and lawsuits, is failure to provide meal and rest periods. Plaintiffs' counsel are looking for the following when assessing and placing settlement value to the claims:
 - Does the employer have a policy compliant with *Brinker*?
 - Does the employer have a mechanism for employees to report meal and rest period violations?
 - Is the facially non-complaint time record rate greater than 15% (i.e. do the time records show a greater than 15% instance where a meal period is short, late or not taken at all)?
 - Does the employer have separate pay codes for meal and rest period premium pay and is there an established history of paying out **both** meal and rest period premiums.

Developing Claim Trend: Meal and Rest Periods

- Plaintiffs' counsel are looking for the following when assessing and placing settlement value to the claims (cont):
 - Does the employer pay a meal period premium, where there is a facially non-complaint time entry, more than 50% of the time?
 - Do the time records have a consistent meal period start time and end time (e.g. meals always start at 12:00 or 12:30)?
 - Are there meal period waivers, particularly for a shift between 10-12 hours in length? If so, is there an issue with the providing of the 3rd meal period.
 - Does the employer use a break notification system (whistle, bell, supervisor announcement) where there is exactly 10 minutes or 30 minutes between the notifications? If so, is there an argument that the break is short?

Developing Claim Trend: Rounding Time Practice Challenge

- Plaintiffs' counsel are seeking to exploit an ambiguity and conflict that currently exists under California law.
- In *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239, the California Court of Appeal found an employer is entitled to use a rounding policy if the rounding policy is fair and neutral on its face and if it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. This portion of the decision was not appealed.
- In *Troester v. Starbucks Corporation*, (2018) 5 Cal. 5th 829, the California Supreme Court rejected the de minimis doctrine under California wage law unless “there are claims involving employee activities that are so irregular or brief in duration that employers may not be reasonably required to compensate for time spent on them.

Developing Claim Trend: Rounding Time Practice Challenge

- How does one reconcile rounding time pay when *Troester* in each requires that employees be paid to the minute?
- What is the breakdown between time the employer benefits versus the time the employee benefits from the rounding time system, where the system will ultimately be upheld (e.g. 50%/50%, 55%/45%).
- Does the employer have a grace period for employees to show up late before counting it as an “occurrence,” a violation of company policy or some alternative adverse action? If not, does that implicitly negatively impact the neutrality of the rounding time policy?
- Does the employer use a rounding time policy for all punches? If so, is there a potential problem with meal period compliance?
- Employers must ensure that raw time punches are preserved in addition to the rounded time records.

Developing Claim Trend: Bag Check/Off-the-Clock Claims

- There has been a significant rise in the number of off-the-clock claims based upon *Troester* and its progeny. The off-the-clock claims arise in the following contexts:
 - Bag check cases;
 - Meetings and trainings where employees “sign in” but don’t clock-in or identify the arrival and departure time. This could be for off-site training, on-line training or on-site training on a day off.
 - Openers and closers who attend to security and operational tasks before clocking in, most notably when the timekeeping system is on a computer.
 - Non-exempt employees who text and communicate electronically with colleagues/supervisors after-hours or on weekend on work-related matters (e.g. “A customer is here right now and I wanted to see what you two discussed when she was here earlier this week”).

Developing Claim Trend: Bag Check/Off-the-Clock Claims

- There are multiple considerations, from a documentation and discovery standpoint, in these cases:
 - Video surveillance footage;
 - Network log-in and log-outs;
 - Usage data regarding mobile devices that field employees may utilize; and
 - Point-of-sale data and records.

Developing Claim Trend: Bag Check/Off-the-Clock Claims

- Defending these claims involve non-traditional strategic initiatives:
 - Utilization of experts for time-motion studies and electronic record comparison;
 - Purchasing of storage devices to preserve video footage;
 - GPS surveillance consistent with California law; and
 - Extended litigation hold directives.

Developing Claim Trend: Suitable Seating Cases

- Suitable seating cases continue to be filed on a regular basis.
- The California Labor Code and the seminal case, *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal. 4th 1, state that employers must provide their employees with “suitable seats” when the nature of the work reasonably permits the use of such seats. This requirement creates the need to determine whether the work of a particular job reasonably permits the use of seats.
- It is possible that a seat is required for certain job functions or certain parts of the day. Multiple retailers have defended seating cases brought on behalf of retail store associates.

Developing Claim Trend: Suitable Seating Cases

On a per cashier basis, post-*Kilby* seating settlements have been as follows:

Range: \$87.50 to \$1,180

Average: \$374.92

Median: \$100

On a per pay period basis, post-*Kilby* seating settlements have been as follows:

Range: \$4.64 to \$24.90

Average: \$23.14

Median: \$20.00

Nine primary suitable seating settlements ranging from \$700,000 to \$65,000,000

Developing Claim Trend: Supplemental Compensation Calc.

- Following the *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal. 5th 542, plaintiffs' counsel have continued to challenge bonus and commission programs in various ways:
 - Is the bonus truly a variable bonus or is it a flat sum bonus not dependent on the quantity of hours worked?
 - Takeaway is that bonus calculations need to be included in regular rate of pay and its just a matter of what hours to count and what denominator to use.

Developing Legal Trend: Calculating Subsequent Violation Rate

- For most PAGA penalties, there is a penalty of \$100 for the initial violation and \$200 for each subsequent violation. The subsequent violation is triggered when “notice is provided to the employer,” but the question is what is notice?
 - LWDA letter, complaint being filed, summary judgment?
 - In *Magadia v. Wal-Mart*, (2019) 384 F.Supp.3d. 1058, a federal district court found that it was only at summary judgment when the subsequent violation rate can be triggered.

Developing Legal Trend: PAGA Stacking

- Attorneys have consistently debated, at mediations, whether an aggrieved employee can recover multiple PAGA penalties in one pay period (a.k.a stacking). This concept has been consistently utilized to justify opening demands greater than \$100 per pay period and also to facilitate larger settlements.
- Although there continues to remain no appellate decision on-point, we note the following: 1) trial courts have been unwilling to make early rulings striking down this concept; 2) trial courts still have not issued more than \$100 per pay period in any PAGA penalty award; and 3) dicta in certain federal court cases indicate a receptiveness to allowing for multiple penalties to be issued.
- Additionally, recent decisions have found that if an employee can show they were aggrieved through one violation of the California Labor Code (e.g. meal period) that they can recover for violations of other California Labor Code provisions (e.g. rest period) incurred by colleagues even though the employee did not suffer the violation of the second California Labor Code provision.

Developing Claim Analysis Trend: Impact of Lawson

- The California Supreme Court's decision in *Lawson* reduced, significantly, potential PAGA damages by prohibiting the recovery of wages under California *Labor Code* Section 558 during the PAGA Period.
- This now prohibits the ability to do a “class action-lite settlement” where the employer settles out on a class period for a one year period and thus incentivizes plaintiff and plaintiffs' counsel to resolve their claims.
- Plaintiffs' counsel have responded by looking more at California Labor Code sections 210 and 225.5 as a basis for seeking additional penalties.

Developing Claim Analysis Trend: Secondary Time Records

- In advance of mediation, plaintiffs' counsel are now requesting data and documents more comprehensive than simple time records:
 - POS data;
 - E-mail searches to identify times that e-mails were sent or received by the non-exempt workforce;
 - Mobile device call logs and account invoices;
 - GPS data;
 - Sales records; and
 - Internal e-mails regarding processing of premium pay (to show to what extent an employer has a bona fide premium pay system)

Developing Claim Analysis Trend: Manageability

- Employers are now becoming more aggressive with investing resources in challenging the manageability of the PAGA case. This frequent requires retention of a statistical expert.
- A recent California Superior Court found, “when a PAGA case as framed in a trial plan presented by the representative plaintiff cannot be litigated, consistent with due process, based on statistical evidence or evidence of a pattern or practice of employer misconduct, but instead fundamentally depends on individualized proof of violations as to numerous employees for whom penalties are sought, the case is unmanageable and cannot be tried as an aggregate PAGA action.”
- Manageability motions should be considered early in cases, particularly if early resolution is not feasible.

Developing Claim Analysis Trend: Impact of Assembly Bill 51

- Assembly Bill 51 prohibited pre-dispute arbitration agreements as a condition of employment regardless of whether it has a class action waiver or not.
- Federal litigation was filed, in December 2019, to invalidate Assembly Bill 51. A temporary restraining order was issued until January 2020.
- The impact of the Court's ruling on the preliminary injunction application.
- Must continue to be mindful of the Section 1 exemption under the FAA for interstate drivers and whether such drivers are covered by a class action waiver.

Developing Claim Analysis Trend: Multiple Individual Claims

- Aggressive plaintiffs' counsel are bypassing early mediation and instead forcing employers to provide contact information for aggrieved employees under the *Williams* doctrine.
- Counsel then find additional aggrieved employees to file individual arbitrations.
- Strategies must be undertaken in order to curb the usage of this tactic, either through Pick-up-Stix drives, declaration drives or requesting smaller sample sizes for contact information dissemination.

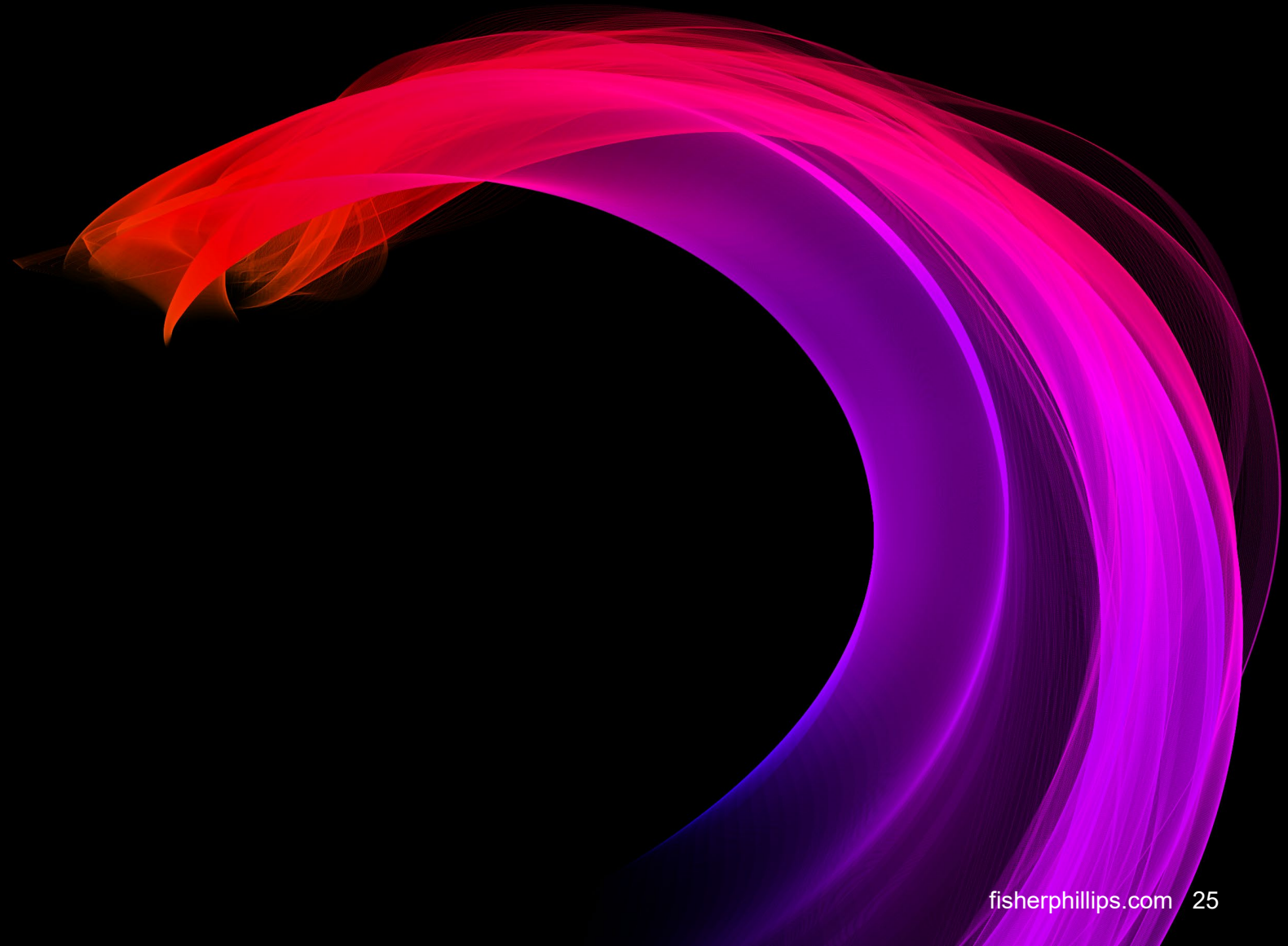
Strategic Tools To Defend PAGA Actions

- Internal audit with focus on payroll practices;
- Curing violation within time period prescribed under the California Labor Code;
- Declaration Drive;
- Accelerating early mediation and not letting delay in securing mediator artificially inflate potential settlement value;
- Research on prior PAGA settlements by opposing counsel to ascertain potential value attributed to your claims;
- How can we make this “unmanageable”
- Implementing reporting structures for requests for meal period premium pay, rest period premium pay and business reimbursement.

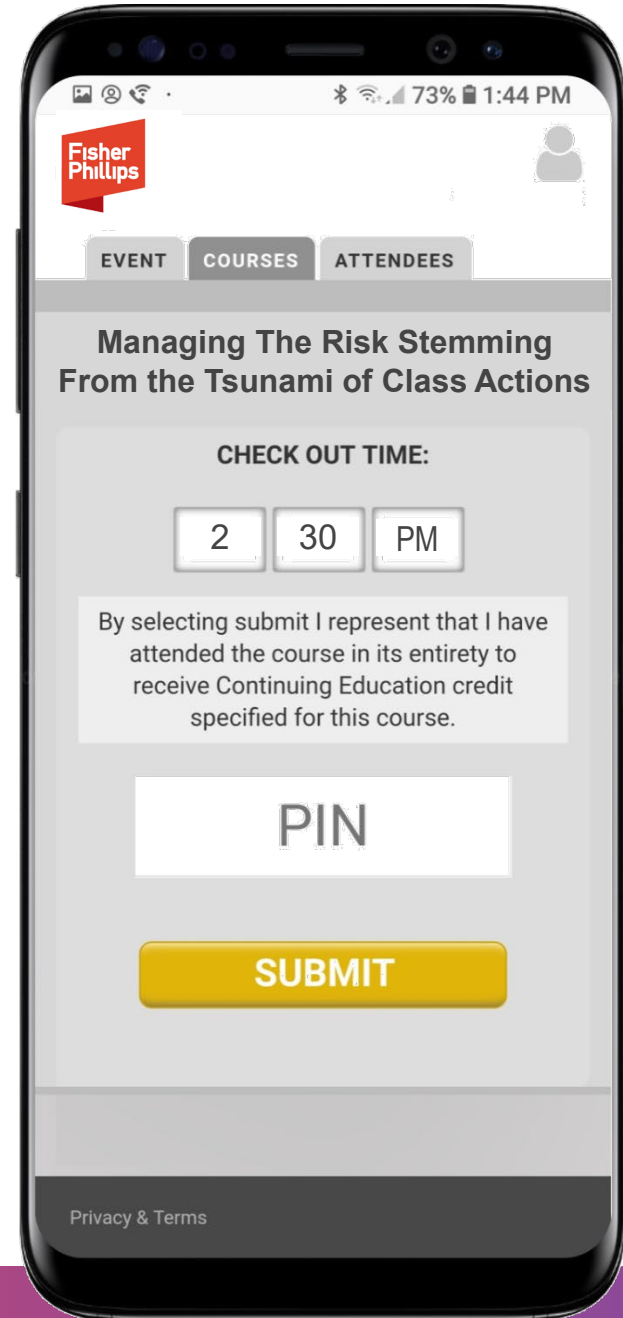
Internal Communication

- How do you explain PAGA to colleagues at the introduction of litigation? When seeking settlement authority? When making litigation strategic decisions?
- What are accounting and business considerations when assessing the risk, liability and value of the case?
- How do you get operational buy-in to remedy any issues discovered during litigation?
- How do you plan for change within the organization as a result of PAGA, or even class litigation?

Questions?



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Thank you

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