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CLIENT ALERT

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PAGA Developments of 2022

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2022 has many California employers suffering from PAGA fatigue. Too many times, plaintiffs' attorneys use the Private Attorneys General Act of 2004 ("PAGA") to drive up settlement demands, gaining large attorneys' fees, over what are seemingly nuisance claims.

PAGA authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations. It has been a thorn in California employers' side since its inception. But 2022 may change the legal landscape for PAGA claims, with the potential for some legal traction for employers.

1. Will PAGA Actions be Subject to Arbitration Agreements?

On December 15, 2021, the U.S. Supreme Court granted petition for writ of certiorari and will review whether a pre-dispute agreement in which an employee agrees to waive their right to pursue a PAGA action is enforceable in *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 734 (2021).

In its Petition, Viking emphasizes that the Federal Arbitration Act ("FAA") preempts state-law rules that interfere with the parties' ability to choose bilateral arbitration, citing to U.S. Supreme Court decisions *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). Viking argues that the FAA requires enforcement of bilateral arbitration agreements that contains PAGA waivers, like how the FAA requires enforcement of bilateral arbitration agreements that contain class action waivers.

In contrast, the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014) held that a pre-dispute agreement in which an employee agrees to waive their right to pursue a PAGA action is unenforceable. Viking argues that *Iskanian* is contrary to the U.S. Supreme Court decisions and that the holdings in *Concepcion* and *Epic* apply to PAGA waivers in arbitration agreements. Viking asserts that the ruling in *Iskanian* has denied California employers the benefits of bilateral arbitration, while employers elsewhere can rely on the guarantees of the FAA.

The U.S. Supreme Court's decision will not only determine whether PAGA waivers in arbitration agreements will remain unenforceable, but will likely influence legislation in states considering PAGA-like statutes.

2. Employers Now Have a Manageability Defense Against PAGA

On September 9, 2021, the Second Appellate District issued a decision in *Wesson v. Staples* offering a manageability defense for employers in PAGA actions.

Fred Wesson brought a PAGA action against Staples on behalf of himself and 345 other current and former Staples general managers in California, seeking almost $36 million in civil penalties for alleged Labor Code violations. He alleged Staples misclassified the general managers as exempt executives.

Staples moved to strike Wesson's PAGA claims on the grounds that the action is "unmanageable" and would violate Staples' due process rights. Staples' affirmative defenses is that it properly classified the general managers such that no labor violations occurred. Staples contended that to successfully assert its affirmative defense would require individualized proof as to each general manager. Staples has over 150 stores across California and each store varied widely in size, sales volume, staffing levels, along with many other variables that affected a general manager's work experience. Thus, Staples argued the claims could not be fairly and efficiently litigated. Wesson argued that the trial court lacked authority to ensure that PAGA claims are manageable and the question of manageability was irrelevant. The trial court granted Staples' motion to strike. Wesson appealed.

The Second Appellate Court affirmed the trial court's decision holding that courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable. The Court also found that "as a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a court's manageability assessment should account for them." Lastly, the Court held that the trial court did not abuse its discretion in striking the PAGA claims when Wesson failed to cooperate with the trial courts manageability inquiry.

In light of Wesson, employers now have a manageability defense to PAGA actions and should evaluate PAGA claims for highly fact-dependent, individualized inquiries that would cause mini-trials to assess the viability of a manageability defense.

3. May a Plaintiff that brought a PAGA action intervene in a settlement of a simultaneously filed PAGA action?

The California Supreme Court granted a petition to review whether a plaintiff in a PAGA action has a right to intervene, object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state. The petition was filed after conflicting opinions between the Appellate Courts. The Supreme Court remittitur with opinion should be filed by May 5, 2022.

Turrieta v. Lyft

Brandon Olson, Million Seifu and Tina Turrieta worked as drivers for Lyft and each filed separate PAGA actions in 2018 alleging Lyft misclassified its California drivers as independent contractors. Turrieta and Lyft reached a $15 million settlement covering all individuals who provided at least one ride on Lyft's platform from April 30, 2017 to December 31, 2019.

Olson filed a motion to intervene arguing he was entitled to intervene as a matter of right because he had an interest in the transaction. The Court denied the motion. After the trial court approved the settlement, Olson also filed a motion to vacate. The trial court denied this motion also. Seifu filed the same motions as Olson.

The Second Appellate District affirmed the denial of the motion to vacate and the motion to intervene. The Appellate Court held that the appellants were not aggrieved nonparties with standing to sue because

Turrieta's PAGA claims are only binding with respect to the state's assertion of PAGA claims and penalties, not any personal claims appellants have against Lyft.

Moniz v. Adecco

The Court in *Moniz* disagreed with the Court in *Turrieta*. Moniz and Correa sued Adecco in separate PAGA actions. Moniz settled her case first, and the trial court approved the settlement. Correa moved for a new trial and to vacate judgment. The trial court denied the request. Correa appealed.

The First Appellate District found that Correa was deputized under PAGA to prosecute Labor Code violations on behalf of the state and may challenge PAGA settlements that are purportedly unfair. A similar decision to *Moniz* was issued in *Uribe v. Crown Building Maintenance.*

The appellants in *Turrieta* filed the petition for review to the Supreme Court. Pending the Supreme Court's review, the opinion of the Court of Appeal in *Turrieta* may continue to be cited both for persuasive authority and to alert trial courts of, and to choose between, the conflicting opinions.

The Supreme Court's decision can impact the finality of any settlements reached in concurrent actions filed.

4. Which Penalty Applies for Inaccurate Wage Statement Claims?

An employer who commits wage statement violations may be subject to the lower default PAGA penalties provided in Cal. Lab. Code Section 2699(f) or the heightened penalties provided in Cal. Lab. Code Section 226.3. When no civil penalty is specifically specified, the default PAGA penalty provided by Cal. Lab. Code Section 2699(f) of $100 per employee per initial violation and $200 per employee per each subsequent violation applies. When a provision of the Labor Code provides for a specific penalty, that penalty applies. Here, Cal. Lab. Code 226.3 provides an initial civil penalty of $250 per employee per violation and $1000 per employee for each subsequent violation when the employer fails to provide a wage statement or fails to keep records required.

In *Gunther v. Alaska Airlines,* plaintiffs sought PAGA penalties for failure to provide adequate wage statements. The trial court found Alaska liable for $25 million in heightened penalties under Section 226.3 of PAGA. Alaska argued the court erred in awarding heightened penalties and that heightened penalties apply only where the employer fails to provide wage statements or fails to keep required records. The Fourth Appellate District agreed that the lower penalties applied and remanded the matter.

In arriving to its decision, the Fourth Appellate District explicitly disagreed with the Third Appellate District in *Raines v. Costal Pacific Food Distributors.* In *Raines*, the Third Appellate District that the heightened PAGA penalties apply for ***all*** violations of section 226.

The conflict between the opinions may warrant a decision by the California Supreme Court to settle the issue. For now, *Gunther* provides a defense for employers to argue that lower PAGA penalties apply when the employer indeed provided wage statements to the employees, but failed to fully comply with the requirements of the Labor Code.

5. Will there even be a PAGA after 2022?

It's no surprise that there are challenges to PAGA's existence both through proposed legislation and through the courts.

A proposed ballot initiative seeks to repeal PAGA and replace it with a new law called Fair Pay and Employer Accountability Act. If passed, employees can no longer file suits on behalf of the State of California for Labor Code violations. The initiative places the responsibility of enforcing the Labor Code to independent state regulators, eliminating the need for employees to file a lawsuit to acquire wages owed. The initiative seeks to double existing statutory penalties and civil penalties for companies that willfully violate the law. The law also awards 100% of the penalties to the employees rather than apportioning 75% to the Labor and Workforce Development Agency. The initiative is yet to reach the ballot. 620,000 voters must first sign the petition to get the initiative on the ballot.

PAGA's existence is also being attacked in courts. On December 31, 2021, the U.S. Chamber of Commerce submitted an amicus curiae brief with the Fourth Appellate District in the matter of *California Business & Industrial Alliance v. Rob Bonta*. The issue in the case is whether PAGA violates the separation of powers of the California Constitution. The U.S. Chamber of Commerce argues that PAGA is unconstitutional because it lacks safeguards to ensure the executive maintains substantial authority over actions such as (a) authorizing the executive to perform a gatekeeping role that prevents litigation from being initiated without the executive's express authorization or (b) authorizing the executive to intervene at any time in the litigation and retake control from the party exercising the delegated authority.

We'll have to see whether the proposed ballot initiative and constitutional challenges are successful. For now, employers have plenty to look out for with PAGA in 2022.

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