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A Look Back At 2021 For California's Private Attorneys General Act, and What To Expect in 2022

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Last year was a significant year for California's Private Attorneys General Act (known as "PAGA"), the 18-year-old wage-and-hour enforcement act that, according to one study, has generated over 20,000 lawsuits against employers over the past five years costing employers, on average, over $1.1 million per case. On its face, PAGA purports to improve enforcement of the California Labor Code by empowering employees to pursue violations that the state enforcement agencies lack resources to take on themselves. Whether it achieves that result is debatable, but it has clearly become a major profit generator for employee-side employment lawyers, who average fees around $372,000 per case. Immune from both class certification requirements and arbitration agreements, PAGA stands as a sometimes unsurmountable challenge for employers who are often forced into settlements because the cost of defending the claims is too great.

There are some signs in the courts and the Legislature, however, that some relief may be on the way. As we enter a new year, we take a look back at PAGA in 2021, and where we see the law headed in 2022.

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Court of Appeals Imposes A Manageability Hurdle

One slight reprieve employers received in 2021 is the imposition of a "manageability" requirement on PAGA claims. PAGA allows a current or former employee to sue on behalf of other "aggrieved employees," so long as the employee experienced at least one of the Labor Code violations alleged "regardless of whether the employee experienced other alleged violations in the same complaint." Because PAGA is not subject to class certification requirements, there has been no "gatekeeper" function to ensure that these representative claims can be decided based on the representative employee's claims without the need to delve into a multitude of individual issues. The real-world consequence of this has been that employers defending PAGA claims are subject to massive discovery costs early on in the case before there has been any determination that the claims alleged can be tried in a fair and efficient way.

In *Wesson v. Staples the Office Superstore, LLC* (decided September 9, 2021), the California Court of Appeals issued a significant decision holding that courts may limit or strike PAGA claims that cannot be rendered manageable for a fair and efficient trial. The recent decision is the first appellate court decision to acknowledge a trial court's ability to dismiss unmanageable PAGA claims under such circumstances, which may help employers reduce the breadth of potential PAGA claims.

How much impact *Wesson* will have is still uncertain. The *Wesson* case dealt with claims that more than 300 store general managers had been misclassified as exempt employees. Misclassification claims tend to turn on an employee's job duties and can be inherently fact-specific, requiring individualized inquiries as to each person. Further, the plaintiff in *Wesson* did not dispute that a trial would take six days per employee– approximately

eight years — to complete. The question remains as to how courts will apply *Wesson* when the manageability question is a closer call.

Only weeks after the *Wesson* decision, California employers received some insight as to how federal courts may apply the case. In *Feltzs v. Cox Commc'ns Cal., LLC*, a California federal judge applied the *Wesson* decision to strike certain PAGA claims regarding meal period violations as unmanageable. The court found that the PAGA meal period claims would require an individualized inquiry because the employer would be allowed to introduce evidence to rebut every specific instance of a purported meal period violation. This would require determination of each employee's work schedule for each day at issue, productivity level, individual credibility, and whether an employee had prior discussions about meal periods, which would render a trial unmanageable. Based on these same issues, the court previously denied class certification as to the meal period claim as precluding a finding of predominant common issues. As such, *Feltzs* provides support for the proposition that Wesson imposes a class-action type predominance requirement for PAGA claims. This will make it more difficult to establish PAGA claims as manageable in the absence of a non-compliant class-wide policy or practice.

A Judgment Reached In One PAGA Action May Foreclose Parallel Claims

One of the particularly frustrating challenges that many California employers face is multiple overlapping PAGA cases. When PAGA cases have overlapping factual and legal issues, but different plaintiffs and plaintiffs' lawyers driving them, fees and costs can skyrocket, particularly when competing agendas are not streamlined. Three recent cases provide some insight into what California employers may expect when they are hit with duplicative and overlapping cases – an issue that is becoming more common every year.

The first case in the trilogy, *Turrieta v. Lyft*, holds that, after a PAGA claim is settled, other plaintiffs with overlapping claims are out of luck and their claims are barred. In *Turrieta*, the Second District Court of Appeal reviewed a lower court decision to approve a PAGA settlement over the objections of a plaintiff with overlapping PAGA claims. In so doing, the Second District held that the first settlement of a PAGA claim extinguishes all other claims addressed to the same alleged violations. Even though *Turrieta* was the last filed of three overlapping cases, the lower court did not permit plaintiffs from the other cases to intervene and object to the settlement because they had no personal interest in the settlement on the grounds that the state—and not the individual employee—is the real interested party in a PAGA action. The Court of Appeal agreed, "[b]ecause it is the state's rights, and not the appellants, that are affected by a parallel PAGA settlement, appellants are not aggrieved parties with standing to seek to vacate the judgment or appeal." *Turrieta* acknowledged the basic principle that aggrieved parties included in a PAGA settlement may not opt out of the settlement to pursue civil penalties for the same violations again within the released time frame on behalf of the Labor and Workforce Development Agency.

In contrast, in *Uribe v. Crown Building Maintenance Co.*, California's Fourth District Court of Appeals allowed a plaintiff in a parallel PAGA action to intervene and object to a settlement of an overlapping claim where the settlement encompassed violations that were not alleged in the settling plaintiff's PAGA notice letter. *Uribe*, which was decided at about the same time as *Turrieta*, did not initially address the validity of the non-party employee's objection to the settlement. Only after opinions were announced in both cases, did the Uribe court then amend its decision to try to harmonize its result with *Turrieta*. In the amended decision, the *Uribe* court reasoned that *Turrieta* was different because, in that case, the lower court

validly exercised discretion not to permit the non-party plaintiff to intervene.

The latest decision, however, *Moniz v. Adecco*, expressly rejected *Turrieta*, instead holding that a non-party PAGA plaintiff does have standing to intervene and object to a settlement in an overlapping case. Specifically, *Moniz* holds that "[a]ccepting the premise that PAGA allows concurrent PAGA suits . . . where two PAGA actions involve overlapping PAGA clams and a settlement of one is purportedly unfair, it follows that the PAGA representative in the separate action may seek to become a party to the settling action and appeal the fairness of the settlement as part of his or her role as an effective advocate for the state."

These decisions leave a split of authority in their wake which, ultimately, will be decided by the California Supreme Court, which has agreed to review the decision. In the meantime, there is some uncertainty for employers defending PAGA claims as to whether a plaintiff pursuing PAGA penalties in one action may challenge a settlement of the same claims in another action. While this may simply come down to whether the presiding judge is more persuaded by *Turietta* or *Moniz*, the fact that the Labor and Workforce Development Agency—the agency charged with administrating PAGA—submitted an amicus letter supporting the objector in *Turrieta* may provide some indication. Companies unlucky enough to get sued multiple times for the same alleged PAGA violations may argue that parallel plaintiffs have no standing to intervene on a settlement reached on overlapping claims, but those arguments may fall on deaf ears.

The Legislative Exempts Unionized Janitorial Jobs From PAGA

Effective January 1, 2022, unionized janitorial employees covered by certain collective bargaining agreements are exempt from PAGA under California Labor Code § 2699.8. This new legislation

demonstrates an effort to address costly PAGA litigation through legislative measures.

The statute defines janitorial employees as individuals "whose primary duties are to clean and keep in an orderly condition commercial working areas and washrooms, or the premises of an office, multiunit residential facility, industrial facility, health care facility, amusement park, convention center, stadium, racetrack, arena, or retail establishment." For the exemption to apply, the collective bargaining agreement must provide for "the wages, hours of work, and working conditions of employees" and provide premium wage rates for all overtime hours worked. The agreement must also provide a grievance and binding arbitration procedure to redress Labor Code violations, and ensure employees receive a regular hourly wage not less than 30% more than California's minimum wage (currently $15 per hour), among other things. If all requirements are met, such janitorial employees are prohibited from asserting PAGA claims; however, they can still pursue any other civil action against an employer, including, but not limited to, claims for discrimination, harassment, and retaliation.

The janitorial employee exemption is only one of two such narrow exemptions to PAGA. A similar exemption for "employees in the construction industry" covered by certain collective bargaining agreements became effective on January 1, 2019.

The United States Supreme Court Will Decide Whether PAGA Claims Can Be Waived In Arbitration Agreements

After nearly seven years of waiting, employers will finally see the United States Supreme Court take on the issue of whether PAGA claims can be waived by arbitration agreements. Ever since the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion* approving class action waivers in arbitration agreements, employers have sought to extend those waivers to PAGA. *In Iskanian v. CLS*

Transportation Los Angeles, LLC, the California Supreme Court held that any waiver of the right to pursue a PAGA claim in court is unenforceable. Since *Iskanian* was decided in 2014, employers in California have been stuck with PAGA claims in court even with valid and enforceable arbitration agreements with class action waivers. As a result, PAGA claims have exploded. According to the California Chamber of Commerce, annual PAGA filings more than doubled from under 2,000 per year to more than 4,000 per year after the *Iskanian* decision, and are expected to continue rising. Part of this popularity traces back to PAGA's immunity from arbitration agreements.

Voters Will Decide PAGA's Future

In October 2021, several business organizations joined together to file a proposed proposition entitled "Californians For Fair Pay and Employer Accountability Act," which seeks to effectively repeal PAGA. California's Secretary of State has approved the circulation of the PAGA reform petition for signatures, which requires the collection of over 620,000 signatures to qualify the measure for the November 2022 general election ballot.

The purpose of the proposition is to change existing law to provide better results for workers without having to use an attorney, and to provide resources to employers to assist them in complying with labor and employment laws. PAGA is generally enforced through civil litigation brought by one or more represented individuals on behalf of a group of aggrieved employees. These individuals step in the shoes of the Labor Commissioner and seek to enforce the Labor Code on its behalf. As such, PAGA requires that 75% of any civil penalties collected go to the Labor and Workforce Development Agency ("LWDA"), with the remaining 25% going to the workers. Plaintiffs' counsel who initiate PAGA actions typically negotiate up to 40% of the total settlement for attorneys' fees and costs, leaving 45% of the total settlement for the LWDA and only 15% for the workers.

The proposition is designed to correct this disparity by removing the private right of action to enforce actions on behalf of the LWDA. Instead of enforcing PAGA through civil, representative actions, employees would file complaints directly with the Labor Commissioner, allowing them to collect 100% of the recovery, rather than having to share it with an attorney and the LWDA. The proposition would also require that the Division of Labor Standards Enforcement ("DLSE") be a party to any employee complaint filed with the Labor Commissioner and that the state sufficiently fund the DLSE's mandates. Further, it would seek to hold employers who willfully violate the law more accountable by doubling penalties for willful violations and create a Consultation and Publication Unit to provide confidential consultation to employers.

The passage of the proposition would come as a welcome relief to California employers, both big and small, from "shakedown" PAGA actions.

For questions regarding PAGA actions, contact your Akerman attorney.
