Supplement to the Los Angeles and San Francisco
Daily Journal
MAY 1, 2024

COLUMN

Recent issues impacting mediation and settlement of PAGA cases

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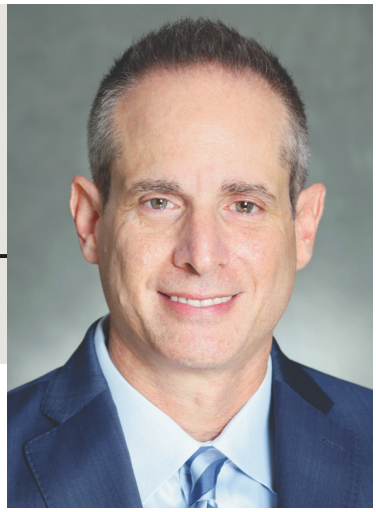

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The Private Attorneys General Act of 2004 (Labor Code section 2698 et seq. PAGA) was enacted by the California Legislature to achieve maximum compliance with the state labor laws by allowing aggrieved employees, acting as private attorneys general, to recover penalties on behalf of the California Labor and Workforce Development Agency (LWDA). *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009).

As employers have increasingly imposed arbitration agreements with class action waivers on employees, plaintiffs have increasingly turned to PAGA claims as an alternative means of bringing representative actions for Labor Code violations.

New cases and new issues regularly arise that impact PAGA cases and the resolution of those cases.

WHEN DOES ISSUE PREDUSION APPLY?

In cases where there are arbitration agreements with a prohibition on bringing representative claims in arbitration, trial courts regularly stay PAGA representative actions while ordering the plaintiff's individual PAGA claims to arbitration. What is the implication on the representative PAGA action when the plaintiff prevails or loses on their individual claims at arbitration?

Generally, issue preclusion precludes re-litigation of issues argued and decided in prior proceedings where the party against whom preclusion is sought is the same party, or is in privity with the party, to the former proceeding. *Rocha v. U-Haul Co. of California*, 88 Cal. App. 5th 65, 78 (2023).

In Rocha, two brothers sued U-Haul for retaliation under Labor Code section 1102.5. The trial court rejected the brothers' attempt to amend their complaint to add a PAGA claim based on section 1102.5. The brothers' individual claims were compelled to arbitration, where they lost on their section 1102.5 claims. Id at 73-74. The Rocha court affirmed the trial court's decision to deny leave to amend the complaint to add a PAGA claim based on section 1102.5, holding that issue preclusion applied because the arbitrator's finding that the brothers did not suffer any Labor Code violations meant that they were not "aggrieved employees" and thus lacked standing to pursue representative PAGA claims for the same alleged violation. Id. at 76-82.

The Rocha court criticized the earlier decision in *Gavriiloglou v. Prime Healthcare Management, Inc.*, 83 Cal.App.5th 595 (2022), which held that issue preclusion did not bar the plaintiff's representative PAGA action despite an arbitrator's finding that the plaintiff had not suffered any Labor Code violations, because the plaintiff was acting in dif ferent capacities in the two proceedings (individually in arbitration, and as a representative in court). Id at 80-82.

In *Adolph v. Uber Technologies, Inc.*, 14 Cal.5th 1104 (2023), the California Supreme Court cited to Rocha approvingly in dicta as to issue preclusion, when it suggested that if an arbitrator finds that the plaintiff is an aggrieved employee, this would be binding on the trial court and would establish standing on the representative PAGA action. Conversely, if the arbitrator finds that the plaintiff is not an aggrieved employee this would also be binding on the trial court and the plaintiff would not have standing to prosecute the representative claims. Adolph, supra, 1123-1124.

One might be excused for thinking this has resolved the matter of issue preclusion in PAGA cases. However, in his concurring opinion in the 9th Circuit case of *Johnson v. Lowe's Home Centers, LLC*, 93 F.4th 459, (9th Cir. 2024), Judge Kenneth Lee raised another unanswered question. He explained that the "full and fair opportunity to litigate" exception to issue preclusion applies to PAGA. Judge Lee discussed that arbitration is usually a low-stakes informal proceeding often with low damages claims at issue, but that if legal conclusions or factual findings from an individual PAGA arbitration could be binding in the court representative PAGA action, a high-stakes proceeding where substantial dollar amounts are at issue, companies will have little choice but to devote substantial resources to the individual arbitration, which undermines the efficiency of arbitration. Id. at 466. Judge Lee opined that "[i]ssue preclusion thus does not apply if the party sought to be precluded … did not have an adequate opportunity or *incentive* to obtain a full and fair adjudication in the initial action." (emphasis in original; internal quotations omitted). The concurring opinion also noted that in federal court, the plaintiff would also be required to show standing under Article III of the Constitution, which is a more rigid requirement than standing for PAGA claims. Id at 466-467.

This remaining uncertainty as to the application of issue preclusion to PAGA claims creates risk to all parties which should be a strong motivator for mediation of such claims.

THE CALIFORNIA SUPREME COURT WILL DECIDE WHETHER A PLAINTIFF IN A PAGA ACTION MAY INTERVENE IN ANOTHER PAGA CASE

Often a factor for employers in settling PAGA lawsuits is that once they are approved by the court, they can effectively preclude other PAGA lawsuits by other employees over the same or similar claims. An issue that sometimes arises when there are multiple PAGA lawsuits against the same employer with overlapping claims is where the parties in one case reach a settlement,

and the plaintiffs in the other cases may have objections to that settlement.

In *Accurso v. In-N-Out Burgers*, 94 Cal. App.5th 1128 (2023), In-N-Out was facing six overlapping PAGA lawsuits. In-N-Out reached a settlement in the Accurso case, which was one of the later-filed actions. This settlement would have eliminated the other actions. The plaintiffs in two of the other cases sought to intervene and object to the settlement in the Accurso case. Id. at 1133-1134. The trial court denied the motion to intervene on the grounds that the plaintiffs did not have a personal interest in the PAGA claims prosecuted by Accurso, as the interest lies with the State as the real party in interest. Id. at 1135. The appellate court agreed that there was no right based on mandatory intervention, but remanded for reconsideration as to whether plaintiffs could establish permissive intervention. Id. at 1153-1157.

The Accurso decision broke with the decision in *Turrieta v. Lyft, Inc.*, 69 Cal. App.5th 955, 977 (2021) which found intervention in a similar situation inappropriate because a PAGA plaintiff has no personal interest in PAGA claims brought on behalf of the State of California.

Both the Accurso and Turrieta cases have been granted review by the California Supreme Court, which will hopefully provide clarity on when plaintiffs with overlapping PAGA cases can intervene in another case. Until then, the uncertain status of this issue may lead to more overlapping cases. When negotiating settlements, the parties need to consider whether the terms of the settlement will withstand objections from plaintiffs in competing cases.

THE PROPOSED BALLOT INITIATIVE TO REPEAL AND REPLACE PAGA

The California Employee Civil Action Law Initiative has qualified for the ballot for the upcoming election in November 2024. If passed, this law would repeal PAGA and replace it with the Fair Pay and Employer Accountability Act. (FPEAA).

If enacted, the FPEAA would increase penalties for willful Labor Code violations, require 100% of the penalties awarded to go to the aggrieved employees (rather than the current 25%), grant the Division of Labor Standards Enforcement (DSLE) exclusive authority for Labor Code enforcement, and most significantly for wage and hour attorneys and employers, eliminate the awarding of attorney's fees.

We can expect heavy media campaigns for and against this initiative as we approach November 2024.

There are some arguably ambiguous provisions in the initiative. For example, Section 4(c) of the initiative provides that "[a]fter the effective date of this initiative, no penalties shall accrue under the former section 2699 in any pending civil action that has not resulted in a judgment." This would appear to mean that after the effective date, any ongoing PAGA lawsuits may continue, but they will stop accruing additional penalties at that time, although this is not entirely clear.

While this initiative potentially has tremendous implications for PAGA litigation, what is clear is that if this initiative passes, we can likely expect legal challenges delaying the effective date of the new law.

The uncertainty created by this initiative will only increase as November 2024 approaches. Such uncertainty should encourage parties to consider mediation and resolution of PAGA cases.