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EMPLOYMENT LAW UPDATE

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California Court of Appeal Denies Mandatory Intervention of Multiple PAGA Claimants in Overlapping PAGA Action But Allows Trial Court to Determine Whether Permissive Intervention is Proper

Appellants Tom Piplack ("Piplack") and Brianna Marie Taylor ("Taylor") were plaintiffs in Private Attorneys General Act ("PAGA") (Lab. Code, § 2698 *et seq*.) representative actions filed in Orange and Los Angeles counties against In-N-Out ("In-N-Out"). Upon learning of settlement negotiations in a subsequent PAGA action brought by Ryan Accurso ("Accurso") against In-N-Out in Sonoma County, Piplack and Taylor filed a proposed complaint in intervention and request for stay of proceedings in the Sonoma County action filed by Accurso. The trial court denied the motions, relying on *Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955. Arguing the motions were erroneously denied, Piplack and Taylor appealed the trial court's ruling.

The California Court of Appeal for the First District (the "Court") vacated the order denying intervention and remanded for further proceedings consistent with the appellate court's opinion.

Before turning to the trial court's intervention rulings on its merits, the Court detailed PAGA's background principles providing foundation for its intervention analysis. PAGA does not create a property right or substantive right for aggrieved employees. Instead, it is a procedural statute authorizing private citizens to seek civil penalties that state agencies would otherwise be entitled to recover. The PAGA statutory scheme permits the deputization of multiple private parties to pursue similar actions by different employees against the same employer on behalf of the state agencies. Deputization only occurs after 1) the deputized proxy satisfies PAGA's notice requirements and 2) the Labor Workforce and Development Agency ("LWDA") indicates it does not intend to investigate the alleged violations or does not timely respond. Under Labor Code section 2699.3, the alleged aggrieved employee must give written notice of the Labor Code violation, with facts and theories supporting the violation, to both the employer and the LWDA.

The Court ruled that nonparty PAGA claimants who seek to intervene in an overlapping PAGA case must have a "significant protectable interest." Personal interest is not required. The Court found that Piplack and Taylor failed to bear their burden of proving inadequate representation or potential impairment

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of their protectable interest in Accurso's PAGA action. The Court believes nonparty PAGA claimants with overlapping claims may have something significant to add to the settlement approval process. Specifically, intervention provides a means to ensure the perspective of potentially affected non-party PAGA claimants are included in the settlement approval process. Moreover, the trial court has discretion to coordinate overlapping PAGA cases in the interest of judicial economy.

Accordingly, the Court remanded the matter with directions that the trial court proceed to consider Piplack and Taylor's motions for permissive intervention and for a stay, weighing arguments they make in favor of staying the case (fully or partially) against any arguments Accurso and In-N-Out wish to offer for why the motion should not be heard or should be denied.

In short, non-party claimants in PAGA actions cannot intervene as-of-right in another PAGA action but may permissibly intervene at the Court's discretion.

COVID-19 Emergency Rule 9 Tolled PAGA Statute Limitations and PAGA Settlements Cannot Exceed PAGA Notices

In *LaCour v. Marshalls of California, LLC* ("*LaCour*"), a PAGA-only action, the California Court of Appeal reversed the trial court's order partially granting Marshalls' motion to strike Labor Code violations predating November 17, 2020 due to a prior PAGA settlement and affirmed the order overruling Marshalls' demurrer by holding that the plaintiff timely filed his complaint.

The plaintiff in *LaCour* filed this PAGA-only action against his former employer, Marshalls, almost two years after his employment ended on May 31, 2019. Marshalls argued that the complaint was untimely filed because the plaintiff's PAGA notice was not filed with the California Labor and Workforce Development Agency ("LWDA") until November 4, 2020 but the latest the notice could have been filed was August 4, 2020. The plaintiff argued that emergency rule 9 of the California Rules of Court ("Emergency Rule 9") extended the time to file a PAGA claim by 178 days. The trial court agreed with the plaintiff and ruled that Emergency Rule 9 tolled the time for the plaintiff to file his PAGA claims.

PAGA has a one-year statute of limitations for a potential PAGA plaintiff to file a PAGA notice with the LWDA. By applying the one-year statute of limitations (365 days) and the Emergency Rule 9 tolling (178 days), the trial court determined that November 24, 2020 was the last day that the plaintiff could have filed his PAGA notice with the LWDA and the filing of the PAGA notice on November 4, 2020 was timely. Thereafter, the plaintiff had up to 65 days to file his complaint with the court, which he did.

With respect to the prior PAGA settlement, the Court of Appeal did not agree that all of the alleged Labor Code violations predating November 17, 2020 were precluded because the plaintiff alleged some violations that were not asserted in the prior PAGA action. The Court of Appeal held that a PAGA plaintiff cannot settle PAGA claims beyond those set forth in their PAGA notice

such that it would bind the LWDA (and later claimants) to a judgment releasing broader claims.

COVID-19 created numerous complications for employers, including the extension of time in which employees could file PAGA claims. The tolling of applicable statutes of limitations has since stopped. However, this case makes clear that PAGA settlements need to be crafted carefully.

California Court of Appeal Held Individual PAGA Claims Can Be Compelled to Arbitration

In *Barrera, et. al. v. Apple American Group LLC, et. al*., two former employees (collectively referred to as "Plaintiffs") of an Applebee's restaurant sought civil penalties pursuant to the Private Attorneys General Act ("PAGA") against multiple defendants who allegedly own and operate Applebee's restaurants throughout California and other states (collectively referred to as "Defendants"). Although the case was litigated for a year, upon the ruling of *Viking River*, Defendants immediately filed a motion to compel arbitration ("the Motion") asserting (1) Plaintiffs' individual PAGA claims should be compelled to arbitration due to the Plaintiffs' executed arbitration agreements during their employment; and (2) upon granting the Motion, Plaintiffs lose standing to the non-individual PAGA claims. The Court of Appeal held that based on *Viking River*, Plaintiffs' individual PAGA claims must be compelled to arbitration; however, in light of the recent ruling in *Adolph v. Uber*, Plaintiffs do not lose standing to pursue the non-individual PAGA claims.

First, although Plaintiffs and Defendants did not dispute that the Federal Arbitration Act ("FAA") applied, the Court of Appeal established that the FAA governs Plaintiffs' arbitration agreements because the arbitration agreements expressly state that the FAA applies. The Court of Appeal then addressed Plaintiffs' argument that Defendants waived their right to bring the Motion because they unreasonably delayed filing it. The Court of Appeal rejected Plaintiffs' argument reasoning that although Defendants had been litigating the case for over a year, Defendants did not unreasonably delay in bringing the Motion because Defendants were awaiting the ruling of *Viking River*. Immediately following the ruling of *Viking River*, Defendants filed the Motion. Therefore, under the circumstances, Defendants did not waive their right to file the Motion because there was no unreasonable delay.

This brought the Court of Appeal to its next issue—the arbitrability of individual PAGA claims. Based on the following language in the arbitration agreements, the Court of Appeal held that Plaintiffs' individual PAGA claims can be arbitrated:

> In signing this Agreement, both the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute. We also agree that any arbitration between the Company and me will be on an individual basis and not as a class or collective action.

> **This is an agreement to arbitrate all legal claims**. Those claims include: . . . claims for a violation of any other non-federal, state or other governmental law, statute, regulation or ordinance . . . .

The Court of Appeal stated that the arbitration agreements contain unambiguous language that (1) claims will be submitted on an individual basis; and (2) state statute claims are subject to arbitration. Because the PAGA has an individual and non-individual basis, Plaintiffs' individual PAGA claims are subject to arbitration. However, in light of *Adolph v. Uber*, the Court of Appeal held that although Plaintiffs' individual PAGA claims must be compelled to arbitration, Plaintiffs still have standing to non-individual PAGA claims proceeding in the courts. The Court of Appeal did not address whether the non-individual PAGA claim should be stayed as the trial court did not rule on the issue of staying the litigation.

Overall, the Court of Appeal held that the Motion was granted to arbitrate Plaintiffs' individual PAGA claims. This case affirms that individual PAGA claims can be compelled to arbitration; however, a plaintiff still has standing to proceed with the non-individual PAGA claims in court. The litigation surrounding PAGA claims continues.

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