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Settling PAGA Claims at Mediation

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For wage-and-hour practitioners, the California Labor Code Private Attorneys General Act of 2004 (“PAGA”) is equal parts fascinating and frustrating.

That is because PAGA is a highly uncertain and unsettled area of the law right now. There is very little case law or regulatory authority interpreting PAGA at the moment, and what little guidance there is out there is from trial courts that have limited persuasive effect on other courts throughout the state.

For instance, important questions about PAGA’s notice requirements, how to calculate the penalties, arbitrability, scope of discovery, trial management and settlement procedure remain unresolved.

This uncertainty carries over into the mediation context. Until the appellate courts start chiming in on PAGA, attorneys have to do the best they can in a Wild West, frontier environment.

Calculating PAGA Penalties and “Stacking”

As a frequent mediator of PAGA representative actions, perhaps the biggest challenge that I see is how to determine the settlement value of a PAGA claim.

PAGA provides for a civil penalty for violations of the Labor Code in the amount of \$100 for each aggrieved employee per pay period for an initial violation and \$200 for a

subsequent violation. Cal. Lab. Code Section 2699(f)(2). That's where the certainty ends.

Because PAGA penalties are due on a per-employee, per-pay-period basis, the potential liability can add up quickly. But what about when a particular violation, e.g., denial of a meal period, is the underlying basis for additional, derivative violations, such as a failure to timely pay all wages due and a failure to provide accurate pay statements?

Is the aggrieved employee owed three separate penalties for the employer's failure to provide a meal period in this scenario (otherwise known as "stacking"), or is that an inappropriate triple dip? The answer to this question has major implications on the employer's potential liability, and, accordingly, the settlement value of the case.

Discretionary Reduction of PAGA Awards

PAGA also gives the court the discretion to reduce the amount of the penalties awarded on the grounds that they would be, "unjust, arbitrary and oppressive, or confiscatory." Lab. Code Section 2699(e)(2).

This provision is a potential game changer when it comes to the settlement value of a PAGA dispute. While there is no binding authority on the factors supporting a judicial reduction of a PAGA award, several trial courts have exercised their discretion and substantially reduced such awards where the defendant took its obligations seriously and attempted to comply with the law, or where awarding the maximum amount would have put the defendant out of business due to financial hardship.

While these trial court decisions are not binding precedent, they still offer valuable insight on the types of facts and arguments that might be persuasive. The parties who are familiar with these cases and prepared to discuss their application will have an advantage at the mediation.

For example, what efforts did the employer undertake to comply with its legal obligations? Did it have a competent, full-time HR professional on staff? Did it consult with an attorney regarding its wage and hour compliance? And what impact will a maximum PAGA award have on the employer's business? If financial hardship is a factor, then how can the employer prove it? Is the employer willing to share its financial records to demonstrate hardship?

PAGA Settlement Procedures

In the event of a settlement, a key threshold issue is how to allocate the settlement amount. Again, PAGA does not provide much, if any, guidance on how to do it.

According to PAGA, of the total amount of civil penalties due to aggrieved employees, 75% must be distributed to the California Labor and Workforce Development Agency ("LWDA") and 25% to the aggrieved employees. Lab. Code Section 2699(i). An employee also is

entitled to recover his or her reasonable attorneys' fees and costs upon prevailing in a PAGA action. Lab. Code Section 2699(g)(1).

Thus, a good starting point would be to consider how much of the total settlement amount to allocate to the LWDA, the aggrieved employees and attorneys' fees. In addition, it is common in class actions to allocate an incentive award for the named class representative. It is not clear whether a named PAGA representative also is entitled to an incentive award, but they are nevertheless common in PAGA settlements.

Lastly, PAGA requires that the parties obtain court approval of any PAGA settlement, and notice of the settlement must also be provided to the LWDA. Lab. Code Section 2699(l)(2).

PAGA is not clear on what factors the court should apply when evaluating a settlement, but there is some authority suggesting that the factors for approval of a class-action settlement – that the settlement is fair, reasonable and adequate – should apply. Thus, the case law applicable to class-action settlements could be used as a guide when seeking court approval of a PAGA-only settlement.

In addition to these factors, the parties should gather intelligence on their judge's particular practices in approving PAGA settlements. Many judges have standing orders or local courtroom rules that address this. For example, some judges require a noticed motion for approval, whereas others will accept a stipulation and proposed order. The bottom line is that the parties should not wait until after the mediation to gather this information.

In conclusion, PAGA is the uncharted frontier of wage-and-hour law. For this reason, mediating PAGA cases is not for the faint of heart, but those who embrace the uncertainty can get the best results!

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Here is my latest article on mediating PAGA claims. I'm seeing more and more of them in my practice, so I wanted to share my thoughts on some of the key issues. #PAGA #Mediation #ADR #Wageandhour #Disputeresolution

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