AM I LOOKING AT THIS RIGHT?
EVALUATING CALIFORNIA CLASS ACTIONS AND PAGA ACTIONS FROM ALL PERSPECTIVES

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I. Introduction

California employers face an ever-increasing number of class and Private Attorneys General Act (PAGA) actions that usually come with a huge sticker price of alleged damages and/or potential settlement. The high cost of litigating these types of representative actions warrant review of the tools and strategies that are available to deflect and defend class and PAGA actions.

We draw from such in-depth experience of attorneys with varying backgrounds to provide insight about the different perspectives from which the class and PAGA actions should be evaluated to help minimize the employer's exposure and liability. We hope you will find this information useful.

II. Evaluating California Class And PAGA Actions From All Perspectives

We approach the evaluation of class and PAGA actions at roughly three phases of a lawsuit: its conception, birth, and retirement. More specifically, we begin with a discussion of the strategies that employers can use to deflect a lawsuit during the "conception" phase. We continue our discussion into the "birth" phase of the lawsuit with our panel's perspectives on effective litigation and discovery strategies available to defend against existing class and PAGA lawsuits. We end with a look into the "retirement" phase with our analysis of California's class and PAGA action settlements in 2018.[1] The settlement information will provide insight into the type and rigor of litigation and discovery strategies that should be used to best defend against the prosecution of the case.

[1] The settlement analysis is based on 65 hybrid class and PAGA settlements that have been reported by Thomson Reuters in the Westlaw Verdict and Settlement Summary.

A. Prior To Filing The Lawsuit

The most logical starting point is a look at how cases get filed. Those plaintiffs' attorneys with a sophisticated practice devote significant resources to generating case leads. A particular industry or type of business may be targeted, or a particular claim—such as a seating or misclassification—may be pursued.

How do plaintiffs' firms find the representative plaintiff? Most plaintiffs will be found through referrals or advertisements, while some will be secured through private investigators or through class lists. Because class actions and PAGA actions are generally a product of a copious amount of information that has been amassed by the plaintiffs' firms prior to filing suit, the employer should also use counter-investigative strategies, which we discuss later.

A personnel file request will almost always follow once a plaintiff has been identified. The main purpose behind the personnel file request is two-fold: to root out the presence of an arbitration agreement with a class waiver, or to discover whether a collective bargaining agreement exists. These two devices continue to be the two most effective ways to deflect class actions.

1. Collective Bargaining Agreements (CBAs)

In order for the employee to be covered by the CBA, the agreement must "expressly provide[] for the wages, hours of work, and working conditions of the employees," and must also provide for a substantially similar right as provided by California law alleged to have been violated.[2] For example, the CBA must expressly provide for the wages, hours of work, and working conditions of employees, and must provide premium wage rates for all overtime hours

[2] Industrial Welfare Commission, Wage Order Nos. 1-17.

worked, and a regular hourly rate of pay of not less than 30 percent over the state minimum wage.[3]

2. Arbitration Agreements With Class Waiver

The United States Supreme Court has once again sided with employers on the enforceability of arbitration agreements with a class waiver.[4] However, a unanimous Court also held that interstate transportation workers, including contractors, are exempt from arbitration.[5]

We understand that an arbitration agreement may not be suitable for all employers. Indeed, employer responsibility for the fees of a minimal number of individual arbitration cases can add up very quickly. Such employers should consider stand-alone class waivers. While class waivers have generally been presented as a provision to the arbitration agreement, the current legal landscape favoring enforcement of arbitration agreements indicates that standalone class action waivers will likely be enforced in California. We should report that a standalone class waiver is one of many litigation devices currently being developed at Fisher Phillips.

3. Personnel File Requests

A request for personnel file is a clear sign that the employer is being investigated. This should immediately prompt the employer to audit several matters, such as:

- Wage statements to complete compliance with Labor Code § 226(a);
- Timekeeping and payroll records for meal period and final pay violations, application of time rounding policy, or the calculation of the regular rate of pay;
- Compliance of procedures implementing alternative workweek schedules; and
- Uniform/appearance policies.

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[3] CBA exemption of overtime laws do not apply to employees in Agricultural Occupations as defined in Wage Order No. 14 and Household Occupations as defined in Wage Order No. 15.
[4] *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018).
[5] *New Prime Inc. v. Oliveira*, 138 S.Ct. 1164 (2018).

Employers should also obtain some counter-intelligence, such as encouraging employees to report any outside contact inquiring about the working conditions, wages and hours, etc. Employers should also download plaintiff's social media accounts and conduct a comprehensive search of social media for advertising referencing the plaintiff or employer. This is particularly essential for a company with a large workforce, as social media advertisements carries the potential to reach the biggest audience.

We also want to point out a few noteworthy issues concerning the personnel file request. First, a "personnel file" is not defined. But Labor Code section 1198.5 is broad in that it gives employees the right to inspect personnel records maintained by the employer "related to the employee's performance or to any grievance concerning the employee." This would include performance reviews, disciplinary notices or write-ups, incident reports, corrective action plans, complaints, employment application, notices of leaves of absence or vacation, education and training notices, and attendance records.

Further, the right to inspect personnel files does not apply to an employee covered by a CBA if the agreement expressly provides for all of the following: (1) the wages, hours of work, and working conditions of employees, (2) a procedure for the inspection and copying of personnel records, (3) premium wage rates for all overtime hours worked, and (4) a regular rate of pay of not less than 30 percent more than the state minimum wage rate.[6]

[6] Cal. Labor Code § 1198.5(q).

4. Curing Wage Statement Violations Under The Private Attorneys General Act Of 2004

The Private Attorneys General Act of 2004[7] is unique in that it is not subject to arbitration, collective bargaining agreement, or waiver.[8] But employers do have a limited means to deflect a PAGA action. Labor Code section 226(a) permits employers to cure two types of wage statement violations: (1) missing the inclusive dates of the pay period[9] or (2) missing the name and address of the employing legal entity.[10] Specifically, employers have 33 days from the date of the notice to "cure" wage statement violations; corrected and "fully compliant" wage statements must be provided to "each aggrieved employee for each pay period for the three-year period prior to the date of the written notice" within 33 days; and notice of cure that includes a "description of actions taken" must be filed online with the Labor and Workforce Development Agency.[11] If the wage statement violations have been cured, "no civil action pursuant to Section 2699 may commence."[12]

5. True-Up Payments And Belated Compensation

Belated payment of wages in exchange for a release of liability should only be made before a class action is filed. After a lawsuit is filed, putative class members must be informed, at minimum, about the pending lawsuit, nature of claims, status of case, and plaintiff counsel's contact information. Failure to provide these disclosures subjects the employer and its counsel to sanctions, including disqualifications of the employer's attorneys, monetary sanctions, and nullification of any signed release. If there is a practice of failing to pay the applicable minimum

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[7] Cal. Labor Code § 2699, et seq.
[8] *See Hernandez v. Ross Stores, Inc.*, 7 Cal.App.5th 171 (2016) (review denied 2017) (PAGA waivers are invalid as being against California's public policy).
[9] Cal. Labor Code § 226(a)(6).
[10] Cal. Labor Code § 226(a)(8).
[11] Cal. Labor Code § 2699(d).
[12] Cal. Labor Code § 2699.3(c)(2)(A).

wage, however, violations should be corrected immediately with true-up wage payments issued right away to limit employer's exposure to waiting time penalty.

B. After Filing The Lawsuit

We begin the post-filing phase of class and PAGA actions with a discussion of the vigor with which to approach litigation. Due to the potential monetary exposure created by class and PAGA actions, an aggressive approach to litigation is likely to be effective in many cases, particularly those prosecuted by smaller plaintiff firms that do not have the resources to withstand the continuous volleys.

What would be considered aggressive within the context of litigating class and PAGA actions? The litigation strategy would resemble the proverbial death by a thousand cuts, which in practical terms translates to chipping away at the plaintiff's claims, the remedies available, and in some circumstances, the plaintiff himself. For example, early determination should be made as to whether any claim fails as a matter of law, or whether any issues are subject to summary judgment.

For PAGA actions, the manageability of trial should be assessed early on in the case, and previewed to the judge, as part of crafting the court's expectations. There is no one-size-fits-all scorched-earth litigation strategy that works in every case, as the litigation strategy will often be shaped by the facts of the case, opposing counsel, the type of claims, and the employer's willingness to put on a vigorous defense.

That said, when appropriate, discovery should be limited as much as possible, especially in federal court where plaintiffs are held to a higher relevance standard. Discovery wins could also be parlayed into limiting other types of discovery, such as the topics on a PMK/30(b)(6) deposition. Limiting discovery can be achieved by prevailing on a motion to compel or by

obtaining plaintiff counsel's voluntary withdrawal and limitation of the scope of responsive information through the meet and confer process.

An effective method to garner opposing counsel's agreement to limit discovery is by demanding an explanation as to the "what" and "why" of plaintiff's requests. Even seasoned litigators may be unaware of the relevance of a particular request, as discovery requests are generally recycled from case to case. Finally, a deposition of the plaintiff is strongly advised, even for cases going into early mediation, as it can be a valuable tool to undermine plaintiff's case. Another effective defense tactic is to slow down the pace of litigation as much as possible through proper means. The burden of timely prosecution lies solely on plaintiff. Because the nature of plaintiff's practice is one based on volume, many plaintiffs' counsel will fail to timely follow up on matters.

We would be remiss if we ended our discussion about the litigation phase of class and PAGA actions without mention of the importance of crafting the judge's and opposing counsel's expectations of the case. By way of example, non-profit employers should beat the financial hardship drum at every opportunity. The psychology of limiting expectation can be effective in minimizing settlement value.

C. Class And PAGA Settlements: Plaintiff's Valuation Of Wage And Hour Claims

Before we begin discussing settlements, we look at the valuation of plaintiff's wage and hour claims. Generally, the damages available are broken down to four categories: 1) unpaid wages, 2) statutory penalties, 3) civil penalties if PAGA claim is present, and 4) attorneys' fees and costs. While damages vary by claim, we provide a list of common wage and hour claims in the order in which they are typically valued by plaintiff counsel, with the most valued claim first:

- A wage statement claim is often regarded by plaintiff counsel as having high value due to the potentially large recovery and the ease of certifiability.

- Rest period claims are also regarded as having high value, especially if there is a facially violative policy.

- Meal period claims are also treated as having high value due to the sheer number of potential violations that must be paid at the employee's regular rate of pay.

- A failure-to-pay-wages-at-termination/waiting-time penalties claim also has high value due to penalties being calculated at the employee's daily rate of pay with a maximum multiplier of 30 days.
- Regular rate claims also have high value when PAGA penalties are involved because penalties may be assessed for every pay period for every employee.

- Business expense claims based on an expense that regularly occurred is accorded medium value.

- Overtime and minimum wages claims have the least amount of value because the nature of the violations give rise to minimal damages, as the discrepancy between the wages earned and wages paid is typically small.

No valuation would be complete without a discussion of Labor Code section 558 claim, which permits civil penalties measured at $50/$100 in addition to the underpaid wages. These damages could be sought by way of a class action or PAGA action. The presence of a binding arbitration agreement and allegations for unpaid wages in the complaint will determine the venue in which the Section 558 will be litigated; if yes to both, then the claim will be sent to arbitration. If there is neither an arbitration agreement nor allegations of unpaid wages in the complaint, the claim will remain in court under the same rationale as why PAGA claims were deemed not subject to arbitration.

III. Settlement Trends In 2018

We close our discussion with our analysis of the settlement trends in 2018. Based on 65 finally approved settlements in 2018 that were reported by Thomson Reuters, the average amount of hybrid, class/PAGA settlements was at $1.36 million, the average amount of attorney's

fees on these settlements was at $460,000, and the average amount of payment to the Labor & Workforce Development Agency was $29,000.

The cases were pending mostly in the Los Angeles Superior Court, Stanley Mosk Courthouse for an average of 2.6 years. The highest concentration of settlements occurred between 1.5 and 2 years, with an average settlement hovering at $1 million. Overall, the settlements indicate a trend of an average that remained around $1 million for cases that are between 1.5 to 2.5 years old. But the average amount of settlement increases markedly past the three-year mark at about $500,000 at six-month intervals. These trends show that the lowest settlement potential is realized when the case is less than 2.5 years.

IV. Closing Remarks

Our goal was to provide employers with insight and guidance drawing from the varying perspectives of the Fisher Phillips class action and PAGA action practitioners. We hope the information provided will enable you to make informed litigation and pre-litigation decisions.