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Calif. High Court Ruling May Curb PAGA-Only Suits

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Over the last 10 years in California, there has been a meteoric rise in the number of representative wage-and-hour lawsuits brought exclusively under the state's Private Attorneys General Act. These types of claims are also known as PAGA-only actions.

This trend, however, could see a slowdown in the aftermath of the California Supreme Court's recent PAGA decision in *ZB NA and Zions Bancorp. v. Superior Court of San Diego County*.¹ In *ZB*, the state's high court held that a plaintiff in a PAGA action could not recover unpaid wages under Labor Code Section 558. By reaching this conclusion, the court imposed a serious limit on the scope of potential recovery under PAGA.

The Rise of PAGA-Only Actions

The significance of the *ZB* decision is tied, in large part, to the rise of PAGA-only litigation in California. Under PAGA, a plaintiff may bring a representative lawsuit on behalf of himself and other aggrieved employees to recover civil penalties against an employer for violations of the California Labor Code.² Prior to the enactment of PAGA, the civil penalties enumerated in the Labor Code for various violations were only recoverable by the labor commissioner. PAGA, in turn, deputized an employee who suffered Labor Code violations to act as a proxy for the labor commissioner — to step in the shoes of the labor commissioner, so to speak — and seek available civil penalties on behalf of himself and other aggrieved employees.

The phenomenon of PAGA-only lawsuits has risen and grown rapidly in reaction to the proliferation of employment arbitration agreements with class action waivers, which the U.S. Supreme Court has repeatedly affirmed are enforceable.³ Despite the enforceability of class action waivers, the California Supreme Court, in *Iskanian v. CLS Transportation Los Angeles LLC*, held that the right to bring a representative PAGA action could not be waived in an arbitration agreement.⁴

Hence, under *Iskanian*, PAGA became an avenue to bring representative wage-and-hour claims on behalf of employees who had entered into arbitration agreements with class action waivers. However — and this is a key point — the way to immediately proceed on a representative basis was to allege the wage-and-hour claims exclusively under PAGA, and drop the employee's individual wage-and-hour claims brought under the Labor Code provisions with private rights of action (e.g., individual claims for unpaid minimum wages, unpaid overtime, missed meal/rest breaks, unreimbursed business expenses and the like).

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By proceeding as such, one avoided the strong possibility that the employer would compel the individual claims to arbitration, while the representative action was stayed pending resolution at arbitration. As such, PAGA-only actions became commonplace throughout California.

Labor Code Section 558

Prior to ZB, Labor Code Section 558 served an important role in the context of PAGA-only litigation. Labor Code Section 558 states that an “employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty” in the following manner:

(1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

Hence, under Labor Code Section 558, an employer would be subject to (1) a civil penalty of \$50 to \$100; and (2) “an amount sufficient to recover unpaid wages.” Using this provision, PAGA plaintiffs previously sought not only the preset civil penalties set forth by the Labor Code (generally, \$50 to \$250), but also the unique amounts of unpaid wages owed to the plaintiff and the other aggrieved employees. ZB upends this litigation tactic, as set forth below.

ZB Limits the Scope of Recovery Under PAGA

The California Supreme Court granted review in ZB after a split had emerged among state appellate courts regarding whether an employer could compel individual arbitration of an employee’s PAGA claim that sought unpaid wages under Labor Code Section 558. Faced with a lawsuit seeking the \$50 to \$100 civil penalties under Labor Section 558 as well as unpaid wages under the same statute, and a motion to compel arbitration by the employer, one court held that the claim for unpaid wages could be sent to arbitration on an individual basis.⁵ Other California courts rejected this approach, holding that claims for unpaid wages under Labor Code Section 558 could not be compelled to arbitration on an individual basis, and had to proceed as part of a representative action.⁶

The ZB court took up the question, but issued an unexpected ruling. Instead of focusing on the question of arbitrability, it addressed a more fundamental question: Can unpaid wages under Labor Code Section 558 be recovered under PAGA in the first place? Justice Mariano-Florentino Cuéllar’s answer — on behalf of a unanimous court — was no.

The court held that “a close, contextual analysis of the statutory scheme reveals that the amount for unpaid wages referenced in section 558 is not part of that section’s civil penalty and is not recoverable through a PAGA action.”⁷ Rather, the unpaid wages referenced in the statute were compensatory damages that could not be recovered under PAGA, which only authorizes an employee to recover civil penalties as a proxy for the state.⁸

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In construing the statute as such, the court held that Labor Code Section 558 “authorizes only the Labor Commissioner to issue a citation that includes both civil penalty and the same unpaid wages.”⁹ The court’s construction of the statute as such was based on a thorough statutory analysis of Labor Code Section 558 and its analogue Labor Code Section 1197.1, as well as the policies upon which the relevant statutes were premised.

The Impact of ZB

The ZB decision significantly limits the scope of recovery under PAGA. PAGA plaintiffs are now limited to seeking the civil penalties identified by the Labor Code or PAGA’s default civil penalty provision — civil penalties which generally range from \$50 to \$250, but are subject to reduction by a court when “unjust, arbitrary, and oppressive, or confiscatory.”¹⁰ Moreover, by eliminating the individual unpaid wage component, the court’s decision supports the contention that PAGA claims are subject to bench trials due to the equitable nature of the relief involved — i.e., preset civil penalties that are subject to reduction for equitable reasons.¹¹

This new state of affairs also generates important questions for employee-side counsel regarding the filing of a PAGA-only lawsuit where the employee is alleging an underpayment or nonpayment of wages. Filing a PAGA-only action — without bringing the employee’s unpaid wage claims concurrently on an individual basis — presents problems because (1) unpaid wages would not be recoverable; (2) the statute of limitations would be one year (as opposed to three years for an unpaid wage claim under the Labor Code); and (3) the aggrieved employee would only receive 25% of the civil penalty recovery with the remaining 75% going to the state.¹²

Nevertheless, while unpaid wages can no longer be recovered through PAGA, employees remain free to seek those wages through a civil action under Labor Code Section 1194. Indeed, an employee remains free to file a claim for unpaid wages under Labor Code Section 1194 in the same complaint as their claim for civil penalties under PAGA.

In sum, while questions about PAGA still abound, ZB provides welcome guidance on what is and is not recoverable through this unique legal mechanism. The decision is a significant one, and it will likely leave a lasting impact on the phenomenon of PAGA-only litigation in California.

Notes

¹ *ZB, N.A. v. Superior Court of San Diego Cty.*, No. S246711, 2019 WL 4309684 (Cal. Sept. 12, 2019).

² Cal. Lab. Code § 2699(a).

³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

⁴ *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014).

⁵ *Esparza v. KS Industries, L.P.*, 13 Cal.App.5th 1228 (2017).

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⁶ *Lawson v. ZB, N.A.*, 18 Cal.App.5th 705 (2017); *Zakaryan v. The Men's Wearhouse, Inc.*, 33 Cal.App.5th 659 (2019); *Mejia v. Merchants Bldg. Maint., LLC*, 38 Cal. App. 5th 723 (2019).

⁷ *ZB, N.A. v. Superior Court of San Diego Cty.*, No. S246711, 2019 WL 4309684, at *6 (Cal. Sept. 12, 2019).

⁸ *Id.*

⁹ *Id.* (emphasis in original).

¹⁰ Cal. Lab. Code § 2699(e)(2).

¹¹ See *Thomas v. CVS Health Corp.*, 2019 WL 3526344, at *3 (C.D. Cal. 2019) (“[Employee]” has a right to a jury trial on her individual claims, which is not true of the PAGA claims....”); *O'Connor v. Uber Techs., Inc.*, 2015 WL 8587589, at *3 (N.D. Cal. 2015) (no right to a jury trial on PAGA claim because “the statute is focused on the civil penalties that may be awarded by a court.”).

¹² Cal. Civ. Proc. Code § 340(a); Cal. Lab. Code § 2699(i).

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