Daily Journal

Perspective Bookmark

January 12, 2017

Uncertainty over unmanageability, Rule 23 PAGA defenses

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In the 13 years since California's Private Attorneys General Act was enacted, there has been no indication that the number of lawsuits, or the amount of articles written about PAGA, will subside. According to the Legislative Analyst's Office, PAGA notices filed with California's Labor and Workforce Development Agency (LWDA) increased from 4,430 in 2010 to 6,307 in 2014. PAGA, codified in California Labor Code Section 2698 et seq., deputizes private citizens so they can act on behalf of LWDA in seeking civil penalties for Labor Code violations on behalf of themselves and other aggrieved employees, making it a hybrid individual and representative action.

The hybrid nature of a PAGA action is ambiguous and California courts are therefore divided in handling such claims. Particularly, which defenses are available to employers to challenge the PAGA action from the inception of the litigation. Although an aggrieved employee suing in a representative capacity under PAGA is not required to satisfy class action requirements if the action is brought in state court (*see Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009)), California district courts continue to disagree as to whether employers can defend a PAGA action by arguing that (1) Rule 23 class action requirements have not been met or (2) that the PAGA claim is "unmanageable."

FRCP Rule 23

Rule 23 establishes the prerequisites to a class action in federal court, including numerosity and common questions of law. Of late, the issue continues to be whether Rule 23 requirements can be applied to PAGA actions brought in federal court. The district courts in California have been split on the issue and the 9th U.S. Circuit Court of Appeals has yet to definitely decide the issue. Back in 2013, in *Urbino v. Orkin*, 726 F.3d 1118 (9th Cir. 2013), the 9th Circuit considered the application of a PAGA action to diversity jurisdiction, and essentially found that for purposes of diversity jurisdiction a PAGA action must comply with Rule 23. Thereafter in *Halliwell v. A-T Solutions*, 2013 U.S. Dist. LEXIS 166583, at *9-10 (S.D. Cal. Nov. 7, 2013) (affirmed at 2014 U.S. Dist. LEXIS 126919 (S.D. Cal. Sept. 10, 2014)), and in other district court decisions, the court dismissed a PAGA action for failure to satisfy Rule 23. In *Halliwell*, the court noted that *Urbino* "cast doubt upon the notion" that PAGA actions "represent 'the state's collective interest in enforcing its labor laws through PAGA.'" Parroting the 9th Circuit in *Urbino*, the *Halliwell* court found that a PAGA plaintiff brings a claim "not as a representative of the state, but as one of a number of aggrieved employees."

Shortly thereafter, however, in *Ortiz v. CVS*, 2014 U.S. Dist. LEXIS 36833 (N.D. Cal. Mar. 18, 2014), that district court, after discussing the various decisions on the issue, found that plaintiffs need not satisfy the requirements of Rule 23 in order to maintain their PAGA claim. The *Ortiz* court distinguished *Urbino* on the grounds that the decision did not address the interplay between Rule 23 and PAGA or the obligation of a plaintiff bringing a claim.

Accordingly, it appears that employers who are sued based on a representative PAGA action in district court may still defeat PAGA claims by persuading the court to dismiss the action because plaintiffs have not complied with Rule 23. Although, the application of the defense is far from clear and the 9th Circuit needs to offer clarity.

The Unmanageability Defense

Even if Rule 23 does not apply to the PAGA action, the action may still be stricken for being unmanageable. Here too, however, the California district courts are divided. California courts have found that a PAGA action may be determined to be "unmanageable" and subject to being stricken where the circumstances of the case are such that a multitude of individualized assessments are necessary to determine whether any class member has been injured. *Patel v. Nike Retail Services, Inc.*, 2016 U.S. Dist. LEXIS 172257 (N.D. Cal. Dec. 12, 2016) (motion to strike is permissible, but was denied as premature because discovery had not yet been conducted to verify the exact size of the PAGA representative class); *see also Ortiz* (finding that the PAGA claims were unmanageable due to the multitude of individualized assessments.) Such courts have looked to factors similar to determining whether a class action is unmanageable (i.e., a uniform and express employer policy, that the policy is facially unlawful, and that the policy was actually implemented unlawfully.) This application was illustrated in *Brown v. Am. Airlines, Inc.*, 2015 U.S. Dist. LEXIS 150670 (C.D. Cal. Oct. 5, 2015). There, plaintiff brought a putative class action asserting various wage and hour claims and PAGA penalties. The court denied plaintiff's motion for class certification, but the PAGA claims remained. The employer's motion to strike the PAGA action, however, was granted. The *Brown* court determined there would be "too many individualized assessments to determine PAGA violations concerning overtime pay."

On the other hand, and most recently, a district court denied a defendant's motion for judgment on the pleading premised on the unmanageability of the remaining PAGA action. *Tseng v. Nordstrom, Inc.*, 2016 U.S. Dist. LEXIS 176790 (C.D. Cal. Dec. 19, 2016). The district court was "persuaded by the reasoning of cases declining to impose a manageability requirement on PAGA claims." Adopting the rational of other decisions, *Tseng* reasoned that "imposing a manageability requirement [at this stage] would "impose a barrier on such actions that the state law enforcement agency does not face when it litigates those cases itself." However, the *Tseng* court did require, prior to dispositive motion cut-off, that the plaintiff bring a motion to define the scope of the employees whom she represents. Therefore, it is possible, as the *Tseng* case continues to be litigated, that the defendant may renew its unmanageability challenge.

As can be seen from this brief overview, when a PAGA action is first filed an employer may have methods to dispose of the case, but employment attorneys continue to await appellate guidance on the application of Rule 23 and the defense of unmanageability.

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