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THOUGHT LEADERSHIP

What to Consider When Settling PAGA Cases

By Hon. Wynne S. Carvill (Ret.)

The increasing use of arbitration clauses, coupled with class action waivers in standard employment agreements, has led to a dramatic rise in California Labor Code Private Attorneys General Act (PAGA) litigation, which as a matter of California law has been held to be outside the scope of pre-dispute arbitration clauses (*Iskanian v. CKS Transportation* (2014) 59 Cal.4th 348). As a result, PAGA claims, which previously may have been an afterthought in employee class action complaints, are now often the primary claims, and plaintiffs sometimes do not include class claims that an employee might have asserted. Apart from the litigation challenges both plaintiffs' and defense attorneys may face in PAGA-only cases, these actions pose a host of questions that must be addressed when settling them. However, the techniques and formulas used to resolve class actions may not be directly applicable to PAGA-only claims.

In a class action, for example, pre-certification settlement negotiations often try to identify a set of claims that may be resolved on a class-wide basis for a certain amount of money. Once the terms are agreed upon and the settlement is approved by the court, a notice of settlement is sent to all class members, who are offered an opportunity to opt out. As long as only a small number of class members opt out, the defendant may have successfully bought peace. There is, however, no notice or opt-out process providing a means for binding employees who might fall within the definition of "aggrieved employees" in a PAGA case. Instead, the defendant must rely on the court-approved settlement and the principles of claim preclusion to foreclose parallel PAGA suits (*Arias v. Superior Court* (2009) 46 Cal.4th 969). While that may provide some comfort, a PAGA plaintiff's ability to settle a set of claims may be restricted by the underlying Labor and Workforce Development Agency (LWDA) letter that must be sent before a PAGA claim may be asserted. A PAGA plaintiff may have only standing to settle the claims set forth in his or her LWDA letter and may not be able to resolve claims defined differently in the LWDA letters supporting other PAGA suits against an employer. Unlike a class action, these kinds of issues may not be resolved simply by amending the complaint as part of the settlement, because the key issue is the scope and sufficiency of the underlying LWDA letter.

The latter problem is exacerbated by uncer-



HON. WYNNE S. CARVILL (RET.)

tainty as to the degree of claim specificity that must be set forth in the LWDA letter to support the plaintiff's standing to pursue a set of claims in the subsequent PAGA suit (*Brown v. Ralph's Grocery Co.* (2018) 28 Cal. App.5th 824). If as to some claims the LWDA letter just paraphrases the language of the underlying Labor Code section, there is a risk that, if all asserted claims are settled, a subsequent court may determine that the settlement is not as broad as the settling parties contemplated because as to certain claims the letter's notice was too generic to confer standing on the settling plaintiff to provide a valid release to the defendant. Given this risk—compounded in cases where prior to settlement the defense may have filed motions attacking the plaintiff's standing on just this ground—employers may be reluctant to settle the full range on claims asserted in the complaint.

To address these concerns, the parties may need to focus on resolving only the claims pled where the underlying LWDA letter was sufficiently particular to remove any doubt as to standing and the validity of the release. Settlement might also be contingent upon a plaintiff submitting a new LWDA letter asserting with particularity the violations that the settlement may encompass. While a PAGA plaintiff is limited by the underlying one-year statute of limitations, some defendants argue that the statute of limitations is an affirmative defense that the defense may waive to support a settlement and release that reaches

further back. It is unclear whether that rationale is sufficient to give a settling defendant enough comfort to underwrite a settlement that purports to reach back more than a year prior to the filing.

Another approach is to condition the settlement on an amended complaint that includes class allegations covering the same Labor Code violations with a provision that the parties would stipulate to certification for settlement purposes only and that the parties acknowledge defendant's right to oppose certification or move to compel arbitration if the settlement is not approved. Such an approach might be combined with a new LWDA letter that clearly matches the claims to be encompassed in the settlement. For purposes of settlement only, the defense might waive the statute of limitations for any newly asserted claims in the LWDA letter.

Parties should also consider reaching out to the plaintiffs in any other pending PAGA cases to include their cases and the PAGA claims they assert in the settlement. While this may work theoretically, such an approach poses the substantial risk of driving up the price of any settlement that might otherwise be possible on a bilateral basis. Nevertheless, as PAGA plaintiffs often identify and track the other cases pending against a defendant, the settling parties should expect a motion to intervene by a plaintiff in another pending PAGA case who believes the settlement might be used to foreclose the other case. Such an intervenor at the court approval hearing may also raise issues as to the adequacy of the penalty amounts reached in the settlement, which is another area where there is a lack of clarity as to the appropriate standards.

Many of the issues mentioned above may be clarified as additional PAGA appellate decisions are issued. Currently, there is substantial uncertainty as to the requisite particularity in an employee's LWDA letter and with other issues as well. It is this uncertainty that makes it challenging to settle PAGA cases. We are a long way from having definitive "rules of the road" for PAGA settlements comparable to the procedures followed for class actions.

Judge Carvill serves as an arbitrator, mediator and special master/referee in a variety of disputes, including antitrust/competition, business/commercial, class actions/mass torts, employment, insurance, intellectual property, personal injury/torts and professional liability. He can be reached at wcarvill@jamsadr.com