A Timely Analysis of Legal Developments

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In a case of first impression regarding the application of California's Private Attorneys General Act (PAGA) to class action settlements, a California Court of Appeal in *Deleon v. Verizon Wireless* holds that a settlement agreement of a non-PAGA class action waiving "all claims" bars a subsequent PAGA action on behalf of the same class, even if the state never approved the settlement.

"Bounty Hunters" Lose Their State "Badge" as California Court of Appeal Clarifies Several PAGA Issues

By Richard H. Rahm and Vincent J. Mersich

The California Court of Appeal recently decided to publish its decision in *Deleon v. Verizon Wireless*,[1] which provides some much-needed guidance in interpreting the California Private Attorneys General Act of 2004 (PAGA), California Labor Code sections 2898, *et seq*. By holding that the State of California is not required to approve a class action settlement agreement in order for the class members to be able to waive PAGA claims, the court in *Deleon* took a significant step in clarifying the nature of a PAGA action.

Background of the PAGA

California's Labor and Workforce Development Agency (LWDA) is authorized to assess and collect civil penalties against employers that violate certain provisions of the California Labor Code. On the theory that the LWDA lacked sufficient resources to fully enforce the Labor Code, the California Legislature enacted the PAGA, which took effect on January 1, 2004. Known to many as the "bounty hunter law," the PAGA established a civil penalty for virtually every provision of the California Labor Code that did not previously have one. More importantly, the PAGA authorized any "aggrieved employee," *i.e.*, an employee who has had his or her Labor Code rights violated, to seek civil penalties directly through a civil action, where previously only the Labor Commissioner could seek such penalties. In addition, the PAGA authorizes an "aggrieved employee" to pursue PAGA civil penalties on behalf of other current and former "aggrieved employees."

The PAGA has always been somewhat controversial, and it was quickly amended in its first year to stave off lawsuits over violations of minor Labor Code provisions – such as the font size of posters – by creating a separate procedure for pursuing the violation of such provisions. Nevertheless, even after it amended the PAGA twice more, the legislature still left unresolved a number of issues about the nature of such an action. For instance, because the statute designates a PAGA plaintiff as a "private attorney general" who can collect penalties, 75% of which go to the state, is the state necessarily a party to any settlement of PAGA claims? Can an employer settle a class action, in

which the employees agree to waive any potential PAGA claims, even if no PAGA claims were alleged? Finally, is a PAGA action a type of state "enforcement" action in which the aggrieved employee acts on *behalf* of the state, such that the other allegedly "aggrieved" employees have no right to participate in the litigation?

The Facts of the *Deleon* Case

Prior to the *Deleon* case being filed, Jodi Evenson brought a class action lawsuit against Verizon in which she alleged a number of Labor Code violations based on Verizon's purported practice of "charging back" commissions to salespersons.[2] The parties reached a settlement during the early months of 2006, after nearly three years of litigation, and the trial court certified a settlement class of "[a]ll individuals who worked for Verizon as an hourly commissioned sales employee [in California]" during the class period. As a result, Verizon was released from "all claims, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including penalties arising out of any conduct, events, or transactions occurring during the class period that were alleged or which were required to have been alleged in the litigation under the doctrine of compulsory joinder in the *Evenson* suit." No PAGA claims were made in the *Evenson* action, and the settlement did not specifically reference the release of PAGA claims.

In 2005, Saul Deleon filed a representative action against Verizon, in which he sought PAGA penalties (but no damages) for the same employees, based on the same Labor Code violations, as in the *Evenson* class action. Verizon asked the court to dismiss Deleon's complaint on the grounds of *res judicata*, arguing that Verizon had already been released of all claims arising out of the "charge backs" in the *Evenson* class action, which included PAGA penalties attached to such violations. The court agreed with Verizon, dismissing the Deleon complaint without leave to amend, from which *Deleon* appealed. The Second District Court of Appeal thus had before it the issue of whether the settlement of *all* claims in a class action could bar a plaintiff from bringing a subsequent PAGA action based on the *same* set of facts concerning the same employees, even if no PAGA claims were made in the class action.

A Class Settlement of *All* Claims Includes PAGA Claims, Regardless of Whether They Were Alleged in the Class Action

The *Deleon* plaintiff argued that because a PAGA plaintiff is a "private attorney general" for the state, the "aggrieved employee" acts on *behalf* of the state for purposes of enforcing the Labor Code and collecting penalties. The State of California was thus a party in interest in any PAGA action and, for that reason, any settlement that affected PAGA claims must have the consent of the state. The court of appeal dismissed this argument. "Nothing in the statute empowers the employee to bring an action on behalf of the State." Likewise, the PAGA statute "does not confer on that plaintiff the stature of a prosecuting officer, and the fact that the plaintiff may be acting as a so-called private attorney general is irrelevant."

Instead, the *Deleon* court followed the logic of the federal district court decision in *Waisbein v. UBS Financial Services*,[3] and held that because a PAGA action is "an alternative" to an action by the LWDA, it was of no consequence that the LWDA had *not* been notified in the *Evenson* class action (as is required for an employee to bring or settle PAGA claims), or that the State of California was not a party to the settlement of the *Evenson* class action, or that no PAGA claims had been alleged in the Evenson class action. Rather, employees in any class action had the right, as part of a settlement agreement, to waive any claims, including any PAGA claims against their employer, and such a waiver would bar any subsequent PAGA action based on the same set of facts against the same employer. The consequences of the *Deleon* decision are therefore far-reaching.

Settlement of PAGA Claims. Because the state is not a party to a PAGA action, the parties settling a class action in which no PAGA claims have been made, need not designate some portion of the settlement amount to the settlement of PAGA claims. Equally important, no part of the settlement amount need be paid to the State of California in order to release non-asserted PAGA claims. On the other hand, if PAGA claims are alleged in the class action, the PAGA requires Court approval of the settlement and, consequently, the parties will most likely be required to designate some portion of the settlement amount as settlement of the PAGA claims, 75% of which must be paid to the state.

A PAGA Plaintiff Represents Employees and not the State. At least one Superior Court has held that because a PAGA action is an enforcement action, the aggrieved employees are merely witnesses and therefore have no control over the litigation or whether they even want to make a PAGA claim against their employer. Indeed, this same superior court also held that, for the same reason, putative "aggrieved employees" in a PAGA action have diminished rights to privacy, as they are merely witnesses in a Labor Commissioner investigation of Labor Code violations. The court of appeal in *Deleon* rejected this reasoning.

Nature of PAGA Representative Actions. The PAGA is unclear as to the type of representative action an "aggrieved employee" can pursue under the statute, and this question is presently before the California Supreme Court in *Arias v. Superior Court*. No. S155965. Nevertheless, if the *Deleon* court is correct in holding that "the 'aggrieved employee,' not the State, is the plaintiff," then one would expect that putative "aggrieved employees" would have the right to "opt-out" of any PAGA action in which they are purportedly being represented. Likewise, if each "aggrieved employee" is a plaintiff, this may affect the tools an employer can use to defend against such PAGA representative actions, *e.g.*, possible motions for summary judgment against particular aggrieved employees' claims.

While the full ramifications of the *Deleon* decision are difficult to predict, until the California Supreme Court provides additional guidance, the decision may mark a clear turning point in the development of California's Private Attorney General Act.

Richard H. Rahm is a Shareholder and Vincent J. Mersich is an Associate in Littler Mendelson's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Rahm at rrahm@littler.com, or Mr. Mersich at vmersich@littler.com.

[1] No. B202838, 88 Cal. Rptr. 3d 29 (2008).

[2] *Chargeback* is a term used to describe the practice of requiring commission-based sales employees to return commissions when the employee is terminated before a certain period.

[3] 2007 WL 4287334 (N.D. Cal. 2007).