JANUARY 11, 2018

California appellate court holds employee's dismissal of individual labor claims precludes PAGA standing

by Jon Michaelson

A recent decision by California's Second District Court of Appeals highlights an opportunity for California employers to dispose of claims under the Private Attorneys General Act ("PAGA"), Labor Code section 2698, *et seq*. PAGA allows an "aggrieved employee" to bring suit on behalf of the State of California, as well as present and former co-workers, to recover civil penalties for wage and hour and other statutory violations. PAGA claims essentially constitute "penalty" class actions in the employment context. Unlike many other employment-related claims, however, PAGA claims cannot be waived by the employee or compelled to arbitration by the employer. *See, e.g.*, *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 173 Cal. Rptr. 3d 289, 327 P.3d 129 (2014). But a recent case shows that, under the right circumstances, there may still be an "out" for the employer.

In *Kim v. Reins International California, Inc.*, No. B278642, 2017 WL 6629408 (Cal. Ct. App. Dec. 29, 2017), a former employee who had been a "training manager" disputed the employer's classification of that position as exempt from overtime requirements. In addition to asserting individual claims for failure to pay wages and overtime, failure to provide meal and rest periods, failure to provide adequate wage statements, and for waiting time penalties, he also sought injunctive relief under the State's unfair competition law and civil penalties under PAGA (on behalf of himself, his co-workers, and the State). The trial court severed the individual claims and referred them to arbitration, but stayed the unfair competition and PAGA claims.

During the arbitration, following a statutory offer of compromise, the parties resolved the employees' individual claims. The plaintiff agreed to dismiss his individual claims with prejudice and dismiss the injunctive relief claim under the UCL without prejudice. Only the PAGA claim remained.

Returning to the trial court, the employer moved for summary judgment on the PAGA charge, based upon the plaintiff's lack of standing. The trial court agreed and dismissed the PAGA claim. It held that once the plaintiff had settled his individual claims with prejudice, he "was no longer suffering from an infringement or denial of his legal rights. His rights have been completely redressed. He no longer is aggrieved….and [therefore] no longer has standing to bring a PAGA claim." 2017 WL 6629408, at *2.

On appeal, the panel upheld the trial court's dismissal, emphasizing the clear wording of the PAGA statute and its underlying legislative history. The PAGA statute provides that an action may be brought by an "'aggrieved employee'" and that the term "'means a person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.'" 2017 WL 6629408, at

*3 (citation omitted). The Court observed that the term "aggrieved employee" was not included in the original proposed language of the statute, but rather was added later in response to concerns that PAGA should not be utilized by "'persons who suffered no harm from the alleged wrongful act.'" *Id.* at *3. The Court concluded that because the plaintiff no longer met the statutory definition of "aggrieved employee," he had lost standing and could not maintain a PAGA claim. *Id.* Although this did not bar other present or former co-workers from asserting similar PAGA claims, dismissal of the case at bar was proper. *Id.* at *4.

The Court also addressed the plaintiff's assertion that upholding dismissal of the PAGA claim would amount to a "backdoor PAGA waiver," in violation of *Iskanian*. 2017 WL 6629408, at *4. According to the Court, there was no connection between the trial court's order to arbitrate individual claims and plaintiff's loss of standing for PAGA purposes. "Had [plaintiff] chosen to dismiss his individual claims with prejudice in the absence of an arbitration agreement, we would reach the same conclusion." *Id.*

While the decision is carefully limited to the facts of the case, the circumstances involved – where an employee or former employee includes both individual and PAGA causes in a complaint – are not unusual. For the employer, pushing the individual claims into arbitration and then making a statutory offer of compromise (which, if reasonable, will be difficult for a plaintiff to reject) may be an effective way to limit potentially higher exposure under PAGA. For the plaintiff and plaintiff's counsel there are important issues to address: Should individual claims be asserted in the same action? Should a favorable settlement be rejected to protect rights under PAGA? Should substitution of a new named plaintiff be addressed after a settlement? Although the employee's counsel in *Kim* may seek further review in this case by the California Supreme Court (perhaps arguing the result in this case does not comport with the strong policies expressed in *Iskanian* and related cases), for now this ruling provides a potentially useful tool for employers to terminate high-exposure PAGA claims.