

PAGA NOTICE

Claim goes awry for ex-employee who botched PAGA's notice requirements

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Actions brought under the Private Attorneys General Act of 2004 (PAGA) are a bane to employers and their attorneys. The applicable statutory regime is replete with complex penalty and procedural rules, and the PAGA's provisions permitting "representative" actions sometimes seemingly permit employees to sidestep the legal controls that are typically meant to rein in improper class actions. This time, however, the PAGA's tedious "notice" requirements inured to the benefit of the employer when a former employee's notice was phrased in terms of his individual claim and failed to reference other potentially aggrieved employees.

A potentially meritorious wage statement claim

After 17 years of employment with Dunn-Edwards, Hamid Khan's employment was terminated on September 2, 2011. He didn't receive his final paycheck until 11 days later, and the final pay statement failed to include the start date for the applicable pay period. Taken alone, those facts look like potentially meritorious claims for violations of California Labor Code Section 201 (requiring that earned wages be paid to terminated employees immediately upon discharge) and Section 226 (requiring employers to provide accurate itemized wage statements containing, among other things, the "inclusive dates of the period for which the employee is paid"). Although an individual claim like this one is typically of limited value because the recovery would usually be limited to specified statutorily capped penalties, similar scenarios often form the foundation of far-reaching potential class actions and representative actions under the PAGA.

Khan filed suit against his employer for alleged final wage and wage statement violations and purported to sue on behalf of himself and other similarly situated employees, claiming he could establish the prerequisites for a class action lawsuit. After the lawsuit was filed, his attorneys provided Dunn-Edwards and the California Labor and Workforce Development Agency (LWDA) notice of his claims against Dunn-Edwards. Specifically, the notice alleged that Dunn-Edwards "failed to identify all of the required information on *my* final paycheck" and failed "to pay all of *my* earned wages immediately upon termination." The notice made no reference to any current or former employees besides Khan.

After filing the LWDA notice, Khan filed an amended complaint voluntarily dismissing his

individual claim because it had been compelled to arbitration and adding a cause of action under the PAGA alleging that Dunn-Edwards failed to pay wages immediately upon termination and failed to provide accurate itemized wage statements at the time of termination to all former employees on a companywide basis.

Employer relies on PAGA's administrative notice requirements

The trial court ultimately disposed of the PAGA claim, and the court of appeal affirmed the trial court's decision, because Khan's notice to Dunn-Edwards and the LWDA was insufficient under the PAGA's statutory requirements. The PAGA was originally enacted to create a means to allow aggrieved employees, acting as "private attorneys general," to enforce certain Labor Code provisions and recover civil penalties because state enforcement agencies often lack sufficient resources to pursue investigations. However, the PAGA continues to give labor law enforcement agencies primacy over enforcement efforts by requiring would-be plaintiffs to provide those agencies and the employer notice of their intent to pursue a PAGA claim.

Before bringing a PAGA claim, an employee is required to provide notice to the LWDA and the employer describing the specific provisions of the Labor Code that were allegedly violated, including the facts and theories supporting the alleged violation. The court of appeal explained that the "evident purpose" of this administrative notice requirement is (1) to give the LWDA the informed opportunity to decide whether to investigate the allegations itself and (2) to give the employer an opportunity to respond, thereby further promoting an informed agency decision about whether to pursue an investigation.

The court of appeal agreed with the trial court that Khan failed to comply with those requirements when he failed to reference other employees in his LWDA notice. Because Khan's "notice expressly applied only to him, it failed to give the [LWDA] an adequate opportunity to decide whether to allocate resources to investigate [his] representative action. Because Khan referred only to himself, the agency may have determined that no investigation was warranted. Additionally, the notice failed to provide Dunn-Edwards an adequate opportunity to respond to the agency since the notice suggested only an individual violation."

Since the LWDA notice was technically deficient, Khan's PAGA claim necessarily failed entirely under the applicable law. Furthermore, Khan had already dismissed his individual claim and elected to proceed on the PAGA claim alone, so he wasn't permitted to pursue his PAGA claim individually since the PAGA is, in its essence, "only a representative action." *Khan v. Dunn-Edwards Corp.* (California Court of Appeal, 2nd Appellate District, 1/14/18, published 1/22/18).

Bottom line

This case demonstrates that although the PAGA's administrative "notice" requirements often appear to be merely a routine procedural hurdle before an employee or former employee can bring a representative PAGA claim, employers can achieve substantive victories when would-be plaintiffs don't strictly observe the law's procedural requirements. You would do well to carefully preserve and pass along to your employment counsel any documentation related to PAGA notices that you receive. When you're facing a PAGA action, you should expect your attorney to fully exploit any deficiencies in that documentation.

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