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March 23, 2026

Danielle West, PAGA Rulemaking and Policy Analyst
California Labor and Workforce Development Agency
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Re: CELA Comments on Proposed PAGA Rules

Dear Ms. West:

The California Employment Lawyers Association ("CELA") is a statewide non-profit organization of over 1,400 attorneys dedicated to protecting and advancing the rights of California workers. CELA members represent employees in all types of employment cases, including cases involving wage theft and claims under the Private Attorneys General Act ("PAGA"). CELA has a Wage & Hour Committee that meets monthly and an active listserv dedicated to wage-and-hour matters, including PAGA. CELA regularly files amicus briefs in significant employment cases, including PAGA cases such as *Turrieta v. Lyft*[1] and *Uribe v. Crown Building Maintenance*.[2] CELA hosts statewide conferences that regularly include discussion of wage-and-hour matters, including PAGA.

CELA actively participated in the discussions leading up to the passage of PAGA reform measures that became effective in June 2024. As an organization, we have implemented internal policies, such as the Reverse Auctions Policy described below, that aim to ensure our member attorneys use PAGA in a manner that is consistent with CELA's mission to promote justice and positive outcomes for workers.

CELA applauds the recent efforts of the Labor & Workforce Development Agency ("LWDA" or "Agency") to increase oversight of PAGA actions, including its proposal to adopt new PAGA regulations. The State is always the real party in interest, and may properly exercise oversight of actions brought on its behalf by aggrieved employees. While we have suggestions for modifying some of the proposed rules, we generally share the Agency's goals of streamlining PAGA notice requirements; curbing the abusive practices described in the Agency's Initial Statement of Reasons; and ensuring that PAGA settlements are fair and in the best interests of workers.

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[1] *Turrieta v. Lyft, Inc.*, 16 Cal. 5th 664 (2024).

[2] *Uribe v. Crown Bldg. Maint. Co.*, 70 Cal. App. 5th 986 (2021).

The balance of this letter sets forth CELA's comments regarding the proposed rules. To the extent a proposed rule is not included, CELA has no comment.

§ 17415 – New Designations of High-Frequency and Vexatious Filers

CELA supports some aspects of proposed section 17415 and offers more productive suggestions as to other aspects as follows:

17415(b)(1): High-Frequency Filer Designation

This subdivision defines the term "high-frequency filer" as any attorney or law firm that has filed 200 or more PAGA notices during the 12-month period preceding the filing of a particular PAGA notices. As noted in the Initial Statement of Reasons, only eight law firms and four attorneys would meet this criteria for the 2024-2025 fiscal year.

With some reservations, discussed below, CELA supports the general concept of identifying firms and individuals that file a large number of PAGA notices, and subjecting them to more stringent filing requirements as set forth in subdivision 17415(c)(1)(B) (requiring client certification). As noted in the Initial Statement of Reasons, the Agency has been inundated with PAGA notices from certain high-volume filers that are templates with boilerplate allegations. Several examples appear in Appendix C to the Initial Statement of Reasons. CELA does not condone these abusive practices, and supports the Agency's efforts to combat them.

However, some CELA members voiced opposition to a "one size fits all" approach to the high-frequency filer concept because bigger firms with more attorneys might unfairly be labeled as high-frequency filers. Under the proposed rule as currently drafted, a solo practitioner would be able to file 199 PAGA notices per year and still avoid the designation, while a firm with 50 attorneys would have to limit its filings to 199 PAGA notices to avoid the designation. If there is to be a number above which a firm is designated as a "high-frequency filer," CELA would propose that the number be based on the number of attorneys at the firm in question.

Further, the high-frequency designation as currently drafted would provide limited information because so few firms and attorneys will meet the designation (and it seems likely firms will modify their filing strategies to avoid the designation).

An alternative proposal that would yield more information is to require *all* attorneys filing PAGA notices to list three pieces of information: (1) the number of attorneys at their firm, (2) the number of PAGA notices the firm filed in the preceding 12 months; and (3) the number of PAGA notices the individual attorney-filer filed in the preceding 12 months. These numbers could automatically appear on the PAGA notice as part of the form that will be generated pursuant to the newly proposed section 17420. The Agency, employers, and the courts would then have information regarding the number of PAGA notices filed by *all* plaintiff's firms, not just those who have surpassed 200 notices in the preceding 12 months.

If the Agency proceeds with implementing the "high-frequency filer" designation, CELA proposes that the Agency allow any firm so designated an opportunity to respond to the designation to show that it has the resources to litigate a large number of PAGA cases, and is not engaging in abusive notice practices. This would be consistent with the proposed section 17415(d)(1), discussed below, which requires notice and an opportunity to be heard before being designated as a "vexatious filer."

17415(b)(2): Vexatious Filer Designation

While CELA supports the Agency's efforts to curb abusive PAGA notice practices, we strongly oppose the use of the term "vexatious filer." The term "vexatious" is not appropriate in the PAGA notice context because there has been no determination as to the merits of the underlying claims. *Cf.* California Code of Civil Procedure section 391, which defines vexatious litigants mainly in the context of litigation that has been determined adversely to the filer and matters that have been "finally determined." CELA suggests the Agency adopt less inflammatory terminology such as "non-compliant filer" or "flagged filer."

Furthermore, this paragraph does not indicate what would constitute "repeatedly" filing noncompliant PAGA notices, which may invite Agency overreach. CELA suggests the Agency adopt a warning system under which attorneys are given at least one written warning that their notices fail to comply with PAGA's notice requirements before the Agency may initiate the process to designate them a "non-compliant filer."

17415(b)(3): Prefiling Screening Orders

CELA supports the concept of a "prefiling screening order" for individuals who, after notice and an opportunity to be heard, continue to violate the PAGA filing requirements, provided the term "repeatedly" is defined more precisely. Because the State is the real party in interest in all PAGA lawsuits, we believe the Agency has the authority to monitor and make rules with respect to the attorneys who purport to act on its behalf so long as the rules are consistent with the letter and spirit of the PAGA statute.

17415(c), (d) and (e): Consequences for High-Frequency and Vexatious Filers

CELA's comments regarding subdivisions 17415(b)(1) and (2) also apply to these subdivisions as well. Additionally, CELA opposes the following aspects of these subdivisions:

17415(d)(1): CELA recommends that the Agency indicate more precisely what conduct would result in a "vexatious filer" designation, and that any such designation sunset after a period of time (such as one year) unless the Agency takes affirmative action to extend it.

17415(d)(4): CELA opposes a six month hold on filing a petition to remove a "vexatious filer" designation (with Agency discretion to prescribe a longer period). In light of the drastic

consequences of such a designation, attorneys subject to it should be permitted to challenge it no later than three months after the designation in order to avoid overreach by the Agency.

§ 17420 and §17450 – Clarifications re PAGA Notice Requirements

CELA supports much of the Agency's proposed regulations regarding the content of the notice to be provided to the Agency as set forth in sections 17420 and 17450, and views them as declaratory or clarifying of existing law regarding PAGA notices. As drafted, these provisions properly require basic information about the filing party, the complaining party, and the allegations supporting the claims.

However, there is an inherent tension in section 17420(d)(2)(B) that CELA believes should be expressly construed in favor of the aggrieved employee. The proposed regulation requires "[a] short and plain statement of the facts and theories supporting each violation alleged and personally suffered by the claimant," while also indicating the insufficiency of "conclusory statements" and "generalized or vague allegations of violations without supporting facts."

CELA recommends that this subdivision affirm that the adequacy of notice will be judged under a totality of the circumstances approach, rather than a strict formalism. The sufficiency of the notice should turn on all facts alleged and described in the notice, and good faith efforts to comply with this provision should be liberally construed in favor of the employee.

CELA opposes the proposed language in section 17240(d)(2)(C), which would require, "[f]or each of the violations alleged, the specific Labor Code sections providing the civil penalties the claimant seeks to recover." While this information may be obvious for certain violations, there may be multiple applicable Labor Code sections. For example, overtime violations could trigger numerous Labor Code violations related to, *inter alia*, the misreporting of hours worked, the late payment of wages, the incorrect reporting of hours worked, or the reporting of rates of pay on a pay stub. Certain filers may allege sufficient detail to place the employer and the Agency on notice of particular Labor Code violations but not be aware of all specific Labor Code sections at issue.

Furthermore, courts regularly issue decisions that result in shifting interpretations of the Labor Code, which means a provision that was not applicable at the beginning of a case may subsequently become applicable. These types of changes are difficult to predict, and each "applicable section" may evolve or not be known at the outset of a case.

CELA respectfully submits that what matters is the adequacy of the facts and the allegations (in this example, related to the underpayment), and not whether the filer correctly named each Labor Code section violated. For these reasons, CELA proposes that filers be required to use best efforts to identify all Labor Code sections known at the time of filing to be violated, without risking a finding of inadequacy because the list is later determined to be non-comprehensive. For the same reasons, CELA opposes the similar provision contained in proposed sections 17450(c)(2)(A) and (C), which requires citation to the "specific Labor Code sections in Division 5 allegedly violated by the

employer" and "the specific Labor Code sections providing the civil penalties the claimant seeks to recover."

Finally with respect to notice, CELA observes there is no proposed rule setting forth the consequences for an inadequate notice. CELA proposes the Agency add a subdivision providing the Agency has authority to reject a notice that fails to meet the specified requirements, and the filer will then have 30 days (or some other period of time) to amend the notice, which will relate back to the date with defective notice was filed.[3]

§ 17420.5 - Amendments to PAGA Notices

To the extent § 17420.5 requires claimants file an amended notice that complies with the requirements of § 17420, CELA supports those requirements subject to its comments in the foregoing section.

Under subsection (d), the proposed regulations bar a claimant from amending "a PAGA notice to add violations not alleged in a prior PAGA notice as part of, or at any time after the claimant has reached, a proposed settlement agreement with the employer in a pending civil action." CELA appreciates the spirit of the proposed regulation with its goal of ensuring future deterrence of workplace violations. As aggrieved employees' counsel, we often find ourselves in the position of believing we have reached a resolution, only to be pressured by an employer's counsel to include the release of unpled claims. When this occurs, there is a danger that the newly-added claims have not been sufficiently investigated by the parties to understand the employer's potential liability and exposure for civil penalties to be assessed.

This has the effect of harming the State and the aggrieved employees and undermines the purpose of PAGA to deter wrongdoing. Further, there is a risk other individuals may have properly filed notices with the Agency seeking to represent the State and aggrieved employees for those violations. Because a judgment issued in a PAGA action is binding on anyone "who would be bound by a judgment in an action brought by the government," the settlement could extinguish the claims of other aggrieved employees who had more thoroughly investigated those violations. *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.

It is incumbent on the Agency and any court reviewing a PAGA settlement to ensure the aggrieved employees are adequately represented by counsel who understand the merits of all claims being settled. Allowing claims to be added at the eleventh hour has the potential to undermine the spirit and purpose of the PAGA.

[3] It is CELA's understanding that the Agency has already issued multiple letters to plaintiff's attorneys informing them that their notices are deficient, and providing them an opportunity to amend. CELA believes this practice is proper and within the Agency's authority as the real party in interest, but the procedure should be spelled out in a rule.

To not impede meritorious settlements, however, CELA proposes the following refinement of this proposed regulation to ensure the settlement of newly added claims is adequate, fair and reasonable to all affected aggrieved employees:

> "(d) Notwithstanding subdivision (a), a claimant may not amend a PAGA notice to add violations not alleged in a prior PAGA notice as part of, or at any time after the claimant has reached, a proposed settlement agreement with the employer in a pending civil action unless the parties to the settlement provide the following to the reviewing court and the LWDA: (1) evidence each newly added violation has been corrected including a certification by the employer's counsel and an authorized agent of the employer; or (2) evidence the parties conducted reasonable discovery, including, where necessary, written discovery and/or depositions concerning the alleged violations. This information should be submitted in a written document signed by both the aggrieved employees' and employer's counsel."

CELA also encourages the Agency to provide clearer limits on amendments associated with settlements to cut down on potential gamesmanship. As currently worded, the bar on amendments in subdivision(d) is triggered "at any time after the claimant has reached a proposed settlement agreement with the employer in a pending civil action." We can imagine scenarios where the parties reach a tentative settlement but still submit an amended PAGA notice seeking to add new claims, and then sign the settlement after the amended notice is filed.

To avoid this gamesmanship, CELA proposes the following language be added: "All counsel whose clients are party to any settlement reached after an amended PAGA notice is submitted to the LWDA must submit a declaration to the court and the LWDA certifying that the amendment was not a condition of any proposed settlement between the parties."

§ 17430, § 17430.5, § 17431 – New Rules re Small Employer Cure Procedures

Since the Small Employer Cure Procedures went into effect as part of the PAGA reform measures in 2024, the feedback from our members regarding the effectiveness of the process has been positive. CELA supports the proposed regulations regarding the process, particularly the ones identified herein, as they provide clarifying language and definitions regarding employer eligibility and information regarding LWDA review and authority. The remainder of the proposed regulations appear to codify details of the process typically relayed to the parties once an employer submits a cure proposal.

Section 17430 clarifies employer eligibility for the cure process as set forth in Labor Code section 2699.3(c)(2) by providing the following definition for the term "employee" for purposes of determining if an employer has fewer than 100 employees: "all exempt and non-exempt current and former employees employed by the employer at any time during the one-year period before the filing of a claimant's PAGA notice, whether employed on a full-time, part-time, temporary, seasonal, or intermittent basis and without regard to the location of the employees." CELA supports this clarification because it will assist the Agency in preventing employers who do not qualify from

attempting to utilize the cure process. This section also provides clarifying information regarding the required content of a cure proposal.

Section 17430.5 refines the language in Labor Code section 2699.3(d) as to an employer's ability to invoke the cure procedure when it already initiated the cure process within the preceding 12 months.

Section 17431 explains the Agency's review of an employer's proposal and its authority to deem the cure process concluded if it determines the proposal is insufficient or in some other way deficient.

§ 17461 – Procedures for PAGA Settlements

Many aspects of section 17461 advance the goals of CELA's mission and its Reverse Auctions Policy, and CELA generally supports the proposed rule with suggestions for small modifications. Because the State is the real party in interest, and a PAGA settlement will release the State's claims, the Agency properly exercises oversight of the settlement process.

The PAGA statute contains only a single provision regarding the settlement of PAGA actions, which provides: "The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." Labor Code § 2699(s)(2). The statute's failure to specify any procedures or standards for settlement approval has led to a hodgepodge of requirements that vary from court to court.

Over the past decade, some PAGA litigants have unfortunately used the lack of oversight to implement settlements that do not effectuate PAGA's goals of maximizing enforcement of the Labor Code and deterring future violations. Where there are multiple overlapping PAGA cases, the employer may select the most receptive and least effectual plaintiff's attorney and offer to settle with them at a reduced price. These so-called "reverse auctions," where the settlement goes to the lowest bidder, harm the State and workers by decreasing the recovery of penalties, and weaken the Agency's enforcement efforts. They also degrade civility in the plaintiff's employment bar.

For these reasons, CELA adopted a Reverse Auctions Policy in 2020 with the goal of encouraging its members to cooperate with each other when multiple PAGA lawsuits are filed against the same employer.[4] CELA members are required to affirm they will follow the Reverse Auctions Policy; attorneys who decline may not belong to CELA.

[4] The policy is available at https://cela.org/?pg=ReverseAuctionsPolicy.

§ 17461(a) & (b): Must Serve Settlement in Overlapping Cases

CELA supports requiring not just the settlement but also any approval papers to be filed with the Agency and served on parties in overlapping PAGA cases. This will deter settling parties from entering into lowball settlements that are concealed from plaintiffs in overlapping cases, a sign of a reverse auction. Several courts already require such notice; the new rule will ensure consistency across the state.[5]

However, CELA disagrees with the requirement in section 17461(b)(1) that the onus be on the settling *plaintiff* in the first instance to identify all other pending cases against the same employer. Instead, the settling *employer* is in a far better position to know about overlapping PAGA cases; typically, the settling defendant is represented by the same law firm in all pending cases.

While the PAGA Case Search function is helpful, it can be difficult for plaintiffs to identify other pending cases against the same employer. In some cases, plaintiffs' attorneys are unsure of the correct name of the employer, and do not use the name of the legal entity that actually employed their client. And, because PAGA notices are not always downloadable, plaintiffs' lawyers must rely exclusively on the information typed in the form when the notice was filed, which is can be incorrect. In some instances, the PAGA Case Search shows that a notice has been filed, but does not reflect that a lawsuit has been filed. It is therefore challenging for the settling plaintiff to determine whether a case against the same employer was actually filed, while the defendant would presumably already have that information.

For these reasons, CELA suggests that section 17461(b)(1) be modified to put the onus on the settling *employer* to create a list of all cases pending against it in the first instance, and for the settling *plaintiff* to verify that the list is complete to the best of their knowledge.

CELA would also suggest that section 17461(a) be revised to explicitly require a settling plaintiff to file a noticed motion for approval of the PAGA settlement, which is consistent with the Reverse Auctions Policy as well as the requirements of several (but not all) courts.[6] Currently, the proposed rule states that the settling plaintiff must provide the Agency with "[a] motion *or other request*" seeking approval of the PAGA settlement. This suggests the Agency may condone the practice of seeking settlement approval by filing a stipulation and proposed order, without filing a noticed motion. But allowing parties to obtain settlement approval via stipulation and proposed order could lead to judges not giving proper scrutiny to PAGA settlements, and would allow settlements to be approved without a hearing. Accordingly, CELA suggests modifying section

[5] *E.g.*, Riverside County, Orange County and Sacramento Superior Courts require settling parties to file declarations stating whether they are aware of any class, representative, or other collective action in any other court asserting similar claims against the same defendant.

[6] *E.g.*, Sacramento requires parties to file a regularly noticed motion for approval of a PAGA settlement.

17461(a) to clarify that PAGA settlements require the approval of the court after hearing upon a noticed motion.

§ 17461(c): Agency Oversight of Settlements

CELA supports the requirement that the Agency have at least 45 days to review any proposed settlement, as well as allowing parties in overlapping cases to submit comments to the Agency regarding the settlement. In *Turrieta*, the California Supreme Court held that PAGA plaintiffs whose claims are extinguished by a settlement in an overlapping case have no right to submit objections or intervene in the settling case. *Turrieta*, 16 Cal. 5th at 716. In reaching this conclusion, the Court observed that the ultimate responsibility for reviewing PAGA settlements lies with the Agency and the courts, noting the Agency was "expected and intended to create meaningful oversight mechanisms that would improve oversight of PAGA cases, consistent with the law's original intent, to improve outcomes for workers and the state." *Id*. at 696 (cleaned up). As Justice Kruger's concurrence makes clear, "there is no apparent basis for questioning the right of the state to participate in [PAGA] litigation . . . since, after all, the state is the real party in interest." *Id*. at 716.

Permitting plaintiffs in overlapping cases to submit comments will assist the Agency in its duty to review the fairness of settlements, and will assist the Agency in deciding whether to participate in the litigation. Plaintiffs in overlapping cases are often in the best position to identify defects in a settlement, particularly if they have litigated a case for far longer than the settling plaintiff. Plaintiffs in overlapping cases may understand a case's value better than the Agency because plaintiffs' attorneys often retain experts to evaluate the data and create damages models. If a defendant abandoned settlement discussions with a PAGA plaintiff only to turn around and settle with a different PAGA plaintiff, these facts are highly relevant to the Agency's assessment of whether the settlement is fair, reasonable, and adequate.

In short, the proposed section 17461(c) is entirely consistent with *Turrieta* and will facilitate the goals of improving Agency oversight of settlements and ensuring that courts have access to critical information that may affect settlement approval.

§ 17462 – Prohibition of Release of PAGA Claims in Pre-Litigation Settlements

CELA supports the requirement that a PAGA case be filed before any PAGA claims (individual or on behalf of others) may be settled.[7] This requirement will ensure that the State, the real party in interest, is aware of all PAGA settlements that purport to release the State's claims, and that courts have oversight of all PAGA settlements as required by Labor Code section 2699(s)(2).

[7] This rule would not preclude the parties from including a "covenant not to sue" provision in the settlement agreement, under which the settling plaintiff agrees not to file suit against the defendant in the future, whether on a personal or representative basis.

However, we are concerned that courts may interpret this regulation to prohibit a pre-litigation settlement of an employee's individual claims where the employee has filed a PAGA notice with the Agency. CELA recommends that the following language be added to the end of the regulation: "Nothing in this regulation prohibits an employee from settling and releasing their own individual non-PAGA claims against the employer, even where the employee has filed a PAGA notice." This language already appears in the Agency's Initial Statement of Reasons (at p. 65), but does not appear in the rule. Adding this language to the rule will avoid unnecessary confusion.

Very truly yours,

Leonard Sansanowicz, Chair
California Employment Lawyers Association