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Via E-Mail: Danielle.West@labor.ca.gov

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Re: *Comment Submission Regarding Proposed Rulemaking: Labor Code Private Attorneys General Act of 2004 - OAL Notice File Number Z2026-0121-03*

To the California Labor and Workforce Development Agency:

Fisher & Phillips LLP (the "Firm") hereby submits the following comments regarding the California Labor and Workforce Development Agency's ("LWDA") proposed regulations regarding the California Private Attorneys General Act of 2004 ("PAGA") ("Proposed Regulations").

While the Firm appreciates the LWDA's proposed regulations to address much-needed clarity regarding PAGA and the reforms enacted in June 2024 ("PAGA Reform"), we have identified potential issues and problematic consequences in the proposed regulations that will likely result in less resolution of PAGA cases leading to increased litigation and delaying remediation of potential Labor Code violations as well as leading to an inefficient and cumbersome settlement process overburdening California courts and the LWDA.

This comment sets forth the proposed regulations which are likely to have a positive impact on the legal landscape as well as those which the Firm has identified to be contrary to the purpose of PAGA in addressing Labor Code violations and deterring them in the future.

I. Filing Requirements

The proposed regulations require various documents related to PAGA claims (from both claimants and employers) to be filed online with the LWDA. For example, PAGA notices and amended PAGA notices would be required to be filed with the LWDA via an "online PAGA filing portal." (Proposed Regulations § 17410 (a).) Employer responses would be required to be filed via an "employer response" link. (§ 17410 (a)(2).)

One potential benefit of this requirement is that it could result in attorneys on behalf of employees to file PAGA notices individually and provide key information into required fields in the online portal. In doing so, it may help to prevent the filing of generic, boilerplate PAGA notices that are essentially exact copies with only the name of the employee on whose behalf the PAGA letter is submitted being changed. This will also help both the LWDA and employers in identifying the key issues and alleged Labor Code violations being alleged as well as the legal theories in support thereof, furthering the purpose of identifying and correcting any alleged violations.

II. High-Frequency and Vexatious Filers

The proposed regulations provide for additional notice requirements and other procedures required for "high-frequency filers" and "vexatious filers" of PAGA notices. (Proposed Regulations § 17415.)

In proposing these new requirements, the LWDA notes that "…there have been documented instances of some attorneys filing PAGA notices that are based on templates alleging frivolous, conclusory, or boilerplate violations of the Labor Code…In many circumstances, attorneys engaged in such practices do not report filing PAGA lawsuits, thus demonstrating an apparent strategy of using PAGA notices as a bargaining chip in seeking quick individual settlements and attorneys' fees recoveries without representing or seeking to protect the interests of the state or other aggrieved employees. Accordingly, the [LWDA] has determined certain safeguards are necessary to prevent such abusive practices. (§ 17415 (a)(2).)

A. High-Frequency Filers

The proposed regulations define a "high-frequency filer" as an attorney or law firm that has filed 200 or more PAGA notices in the 12-month period preceding the filing of the current PAGA notice. (§ 17415 (b)(1)(A).) However, the regulations would exclude nonprofit legal aid organizations from this definition. (§ 17415 (b)(1)(B).)

The proposed regulations would require a high-frequency filer to include a cover letter with each PAGA notice that states that the attorney or law firm is a high-frequency filer. (§ 17415 (c)(1)(A).) In addition, the cover letter must be signed by the claimant (employee) wherein the employee certifies that the alleged violations (1) accurately describe the violations the employee believes that personally suffered, and (2) are not presented for an improper purpose, such as to harass or annoy the employer or employers named in the PAGA notice. (§ 17415 (c)(1)(B).)

B. Vexatious Filers

The proposed regulations define a "vexatious filer" as any person or attorney who has repeatedly filed PAGA notices that do not comply with legal requirements, such as not adequately alleging facts to support alleged violations or where the alleged violations are frivolous or appear intended to harass. (§ 17415 (b)(2).)

The proposed regulations would require anyone who has been designated as a vexatious filer to be subject to a "prefiling screening order." (§ 17415 (d)(3)(A).) This would be an order issued by the LWDA prohibiting a vexatious filer from filing any new PAGA notices without first being screened for compliance with applicable statutory and regulatory requirements. (§ 17415

(b)(3).) The proposed regulations provide that the LWDA's investigation of an alleged PAGA claim shall not commence unless and until a conditionally filed PAGA notice has been screened and accepted for filing by the LWDA. (§ 17415 (d)(3)(B).)

These additional procedures and requirements are a positive regulatory change aimed at curbing abuse as described above. The Firm welcomes efforts to reign in some of the most abusive tactics that employers have had to experience by a small number of law firms and attorneys. The regulations add needed scrutiny and prefiling screening of PAGA notices to weed out the litany of boilerplate PAGA notices that prevent an employer from receiving and analyzing needed meaningful information and often do not comply with existing statutory requirements for PAGA claims. (Labor Code § 2699.3 (a)(1)(A), (b)(1)(A), and (c)(1)(A) [whether alleging violation of a provision listed in Section 2699.5, any provision of Division 5 (commencing with Section 6300), or any other provision, the notice must specify "specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation"] (c)(1)(A).) We welcome these proposed regulations.

III. Pre-Litigation Notice and Investigation of Claims

The proposed regulations would require that every PAGA notice must contain, among other things, a short and plain statement of the facts and theories supporting each violation alleged and personally suffered by the claimant. (Proposed Regulations § 17420 (d)(2)(B).) "Conclusory statements, generalized or vague allegations of violations without supporting facts particular to the claimant's circumstances or working conditions, or statements summarizing or restating the law or legal requirements are not sufficient." (§ 17420 (d)(2)(B).)

This proposed requirement is a positive change which the Firm welcomes. This will help further the original intent of the PAGA notice requirement to put employers on actual notice of the alleged violations and theories in support thereof. (See *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 840 ["the purpose of the notice requirement" is to "'allow the employer to submit a response'"].) This much needed clarity will allow employers to investigate the nature of the allegations and make an informed decision on whether to exercise their rights to the cure procedures. Without such clarity, it will frustrate employers' efforts in compliance leading to increased litigation and less cure opportunities.

IV. Small Employer Cure Procedures

Under the 2024 PAGA reforms, an employer that employed less than 100 employees total during the one-year period before the filing of a PAGA notice may submit to the LWDA a confidential proposal to cure a violation or violations contained in such notice. (Labor Code § 2699.3 (c)(2)(A).)

Similar to the PAGA notice proposed regulations, these proposed regulations are a positive development. The PAGA Reforms did not provide significant detail as to the process for the small employer PAGA cures. The proposed regulations provide needed details for the requirements for submitting a confidential cure proposal, how the LWDA will review the cure proposal, the scheduling of cure conferences, preliminary cure determinations, and the process for resolving disputes over the cure process. (Proposed Regulations §§ 17430, 17430.5, 17431,

17432, 17433, 17434, 17435, 17436, 17437, 17438, 17439, 17439.5, 17440, 17441, 17442, and 17443.) We welcome these proposed regulations.

V. Wage Statement Cure Procedures

The 2024 PAGA reforms also revised an existing procedure whereby any employer could seek to cure only an alleged violation or violations of Labor Code section 226 governing wage statements. (Labor Code § 2699.3 (c)(3); Proposed Regulations §§ 17440, 17441, 17442, and 17443.) The proposed regulations set forth specifics regarding the cure process and the resolution of disputes regarding whether the employer has cured the violation. (§§ 17440, 17441, 17442, and 17443.) Notably, the employer's notice of the cure of wage statement claims must be filed within 33 days of the PAGA notice. (§ 17440 (a)(2).) The notice must describe with specificity the actions taken by the employer, must include a copy of the notice sent to all aggrieved employees providing the correct information and identifying each pay period in which a violation occurred during the three years before the date of the PAGA notice, and must include a copy or the fully compliant wage statements issued or electronically issued to the employees. (§ 17440 (b).)

While this would add an additional administrative requirement to the wage statement cure process, the Firm understands the need for the LWDA to obtain additional information to evaluate whether a proper cure has taken place and does not oppose these proposed regulations.

VI. OSHA-Related PAGA Claims

Existing law contains certain procedural requirements that must be met before a PAGA claim related to alleged workplace safety and health violations may be filed. (Labor Code § 2699.3 (b) Among other things, this process requires a plaintiff to file a notice with Cal-OSHA alleging a violation of workplace safety and health laws, who then has an opportunity to investigate and issue a citation. (Labor Code § 2699.3 (b)(1)-(2).)

The proposed regulations set forth additional details regarding this process. Among other things, the regulations provide that if Cal-OSHA does not issue a citation within applicable deadlines because Cal-OSHA has not commenced an inspection or investigation, the employee may commence filing their PAGA civil action. (Proposed Regulations § 17451 (d).)

However, the regulations do not specifically address the potential situation in which, after a PAGA action has been filed, Cal-OSHA commences an inspection or investigation, such as after receiving new information or while investigating an alleged ongoing violation. The proposed regulations are unclear if the PAGA civil action will be halted if Cal-OSHA is investigating an allegation after the PAGA claim has already been filed in court. Accordingly, we recommend that the LWDA provide further clarity to address this situation and provide guidance to employees and employers alike as to what procedural mechanisms would come into play in such a scenario.

VII. Proposed Settlement Regulations

Existing law requires proposed settlement agreements of PAGA civil actions to be submitted to the LWDA. (Labor Code § 2699 (s)(2).) The proposed regulations set forth specific

requirements and details related to the submission of such proposed settlement agreements. (Proposed Regulations § 17461.)

Notably, the proposed regulations require the settling plaintiff to provide notice by email to all other persons who have actions pending against the same employer at the time the proposed settlement is filed in court. (§ 17461 (b)(1).) Among other things, the notice must inform the other claimants that the proposed settlement agreement will become final if approved by the court and may impact or foreclose their ability to pursue claims against the same employer. (§ 17461 (b)(2)(E).) Any person who receives such a notice is entitled to submit comments to the LWDA within 21 days. (§ 17461 (c)(2).)

The LWDA, in its Initial Statement of Reasons in support of the proposed regulations, states the following regarding these requirements:

> These provisions are necessary because plaintiffs often submit to the Agency only a copy of the proposed settlement agreement itself, which does not afford the Agency sufficient information to effectively review the proposed settlement. The requirement a plaintiff provide notice to other employees with pending PAGA claims against the same employer is necessary to assist the Agency in its review of the proposed settlement and to ensure other employees with pending claims against the same employer are aware of the proposed settlement, which may extinguish other PAGA plaintiffs' claims if approved by the court.

(Initial Statement of Reasons, p. 62.)

In proposing this language, the LWDA cites the 2024 California Supreme Court case in *Turrieta v. Lyft, Inc.* (2024) 16 Cal.5th 664, in which the Court held that PAGA plaintiffs do not have a right to intervene to object to proposed settlements in related PAGA actions.

Moreover, elsewhere the proposed regulations provide that "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." (Proposed Regulations § 17420.5 (d).)

The firm believes these proposed regulations are problematic for several reasons. First, while the language in the proposed regulations does not explicitly give other PAGA plaintiffs a right to intervene (which would directly contravene *Turrieta*), it potentially raises the likelihood that the LWDA may object to a proposed settlement of a PAGA action if the LWDA has received comments from claimants with overlapping claims objecting to the proposed settlement agreement. This appears to be a mechanism to get around *Turrieta*'s holding by granting plaintiffs in related cases the persuasive authority to notify the LWDA that it should object to a settlement. Such authority will certainly lead to fewer settlements and increased litigation. It will also lead to numerous "objections" submitted to the LWDA, adding to its administrative tasks for reviewing settlements. These proposed regulations should not be implemented.

Second, PAGA notices are frequently amended as part of the settlement process to reflect new information about alleged violations revealed during the discovery process and to reflect all

known alleged violations. These proposed regulations will stymy settlements in PAGA cases dramatically. For example, if during the course of discovery or preparation for a mediation, the employee identifies additional Labor Code violations but the employee cannot amend their PAGA letter to include these additional claims, the employee will not be effectively acting as a private attorney general in remedying *all* Labor Code violations the employee identified. The proposed regulations certainly are not intended to prevent the remedying and correction of Labor Code violations discovered during the course of a PAGA action.

Moreover, if an employee cannot amend a PAGA notice to add violations discovered, an employer will be left with inadequate protection because the settlement will only be piece-meal. If an employer cannot enter into a settlement that releases all claims identified in the action, it will significantly discourage an employer from resolving a PAGA action at all. Instead, the employer will be left with three poor options: (1) settle multiple PAGA lawsuits with each alleging unique Labor Code violations resulting in the employer essential paying multiple sets of attorneys' fees, (2) wait for an employee to file the "perfect" PAGA claim alleging all potential Labor Code violations at issue, or (3) litigate multiple PAGA actions because settling multiple PAGA lawsuits would be cost-prohibitive.

The perhaps unintended consequence is this particular proposed regulation will result in increased litigation and expense on California employers that have already been saddled with expensive PAGA litigation and delayed settlements. Delayed or reduced settlements will equate to both the LWDA and potentially aggrieved employees receiving compensation on a longer timeline or not at all. We cannot believe it is the LWDA's intention to cause this result. Accordingly, we oppose adopting these regulations.

VIII. Conclusion

As discussed above, the proposed regulations have some positive ramifications, but areas of potential concern cannot be ignored. The requirements regarding "high-frequency" filers and "vexatious filers" will help to discourage (and in some cases prevent) abuse of PAGA by certain attorneys and firms by filing "copy and paste" boilerplate PAGA notices and cases. However, the proposed procedural requirements imposed on the settlement process may result in hurdles to an employer's ability to resolve competing and overlapping claims and/or result in LWDA being inundated with challenges to settlements by attorneys and firms as an end around the California Supreme Court's decision in *Turrieta v. Lyft, Inc.*

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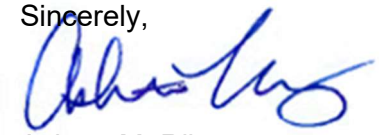
It is the Firm's hope that the LWDA will not proceed with injecting the uncertainty and complications certain to result by enacting the proposed regulations regarding the PAGA settlement process while adopting the regulations that provide much needed clarity to employees and employers alike.

Sincerely,



Ashton M. Riley
For FISHER & PHILLIPS LLP

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