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Ms. Danielle West
PAGA Rulemaking and Policy Analyst
California Labor and Workforce Development Agency
1416 Ninth Street (MIC-55)
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Sent via email to: Danielle.West@labor.ca.gov

Re: Lavi & Ebrahimian, LLP's Public Comment on Proposed Regulation No. 17415

Ms. West,

Lavi & Ebrahimian, LLP respectfully submits the following public written comments in response to section 17415 of the proposed Labor Code Private Attorneys General Act of 2004 ("PAGA") regulations, concerning the new designations of "high-frequency filers" and "vexatious filers."

Lavi & Ebrahimian, LLP has been practicing in the field of employment law for more than twenty years. During that time, the firm has recovered relief for hundreds of thousands of employees who alleged experiencing violations in the workplace. The law firm and its attorneys have gone the extra mile to ensure employees are protected from work place exploitation. Twice, Lavi & Ebrahimian, LLP has won rulings from the Supreme Court of California that advance employee protection in the workplace. (See *Pearson Dental Supplies, Inc. v Superior Court* (2010) 48 Cal.4th 665; *Alvarado v Dart Container Corp. of California* (2018) 4 Cal.5th 542. Additionally, Lavi & Ebrahimian devotes significant resources to undertaking numerous appeals that have also advanced employee protection from exploitation in the workplace.

Lavi & Ebrahimian respectfully submits the below public written comments in response to the proposed rulemaking currently posted on the Labor and Workforce Development Agency's ("LWDA") website.

II. Section 17415(c)'s Imposition Of Additional Requirements Based On Number of PAGA Notices Filed Is Arbitrary And Fails To Effectuate The Stated Purpose Of Addressing Inadequate PAGA Notices

The primary concern to be addressed by the Section 17415(c) is that PAGA notices lack detail and assert boilerplate and conclusory language, limiting the Agency's ability to perform its duties or employers' ability to address alleged violations. (Notice of Proposed Rulemaking ("NOPR") at 9; Initial Statement of Reasons ("ISOR") at 5-7.)

Despite this concern, Section 17415(c) is not based on the content of PAGA notices filed by the attorney or law firm. Section 17415(c) seeks to assign attorneys or law firms with the pejorative label of "High-Frequency Filers," impose additional notice requirements, and potentially designate the attorney or firm as a "vexatious filer" for failure to comply with the additional notice requirements. But Section 17415(c) is based solely on the standard that the attorney or law firm files more than 200 PAGA notices in the preceding 12-month period *regardless of whether the PAGA notices alleges adequate facts and theories to support the alleged violations*.

A regulation intended to increase the quality of PAGA notices must have some basis in the quality of filings before imposing additional filing requirements. Otherwise, the proposed regulation has the effect of assigning a pejorative label and adding hurdles and obstacles to attorneys and law firms as a way of discouraging attorneys or law firms from filing PAGA notices in excess of 200, rather than encouraging adequate PAGA notices. (See Gov. Code § 11349.1, subd. (a)(3) [regulation requires necessity and clarity]; Gov. Code § 11349 ["necessity" means the record demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute]; Cal. Code Regs., tit. 1, § 16(a)(2) [regulation presumed not to comply with clarity standard if the language of the regulation conflicts with the agency's description of the effect of the regulation].) Basis on number of filings rather than notice content fails to further the stated purpose of ensuring PAGA notices assert adequate facts and theories and violates the purpose of the PAGA, which by expressly providing for attorney fees, includes encouraging attorneys to prosecute PAGA litigation. (*Henry M. Lee Law Corp. v. Superior Court* (2012) 204 Cal.App.4th 1375, 1388 [Labor Code attorney fee provisions evidence the legislative intent of encouraging counsel to prosecute such litigation].) Thus, the regulation's attachment of labels and additional hurdles must be based on rates of deficient filings rather than number of filings.

The arbitrary nature of the regulation is further evidenced by the application of the threshold number of 200 PAGA notices to law firms detached from the number of attorneys in that firm representing those employees. Putting aside that the volume of PAGA notices filed by an attorney does not equate to lack of merit of a claim or inadequate notices, a law firm with 40 attorneys who files 200 PAGA notices in a 12-month period would qualify as a High-Frequency Filer under the regulation even though the number of PAGA notices averages to only five PAGA notices per attorney (and regardless of the adequacy of the notice). In contrast, a law firm with five attorneys filing 195 PAGA notices in a 12-month period, averaging 39 PAGA notices per attorney, would not qualify as a High-Frequency Filer. This example further demonstrates Section 17415(c)'s failure to further the stated purpose of increasing the quality of the PAGA notices and rather merely targeting attorneys and law firms based on the number of PAGA notices filed.

Under Section 17415(c), failure to comply with the additional notice requirements for "High-Frequency Filers" permits the Agency to designate the attorney or law firm as a "Vexatious Filer," a label which is intended for a person or attorney who repeatedly files inadequate PAGA

notices or files them for a frivolous or harassing purpose. But this puts attorneys or law firms at risk for Vexatious Filer status because of the number of PAGA notices filed even if all of the PAGA notices are adequate and are filed for a proper purpose. Again, this demonstrates Section 17415(c)'s failure to further the stated purpose of increasing the quality of the PAGA notices.

Nothing about a firm choosing to help more employees by hiring more attorneys and filing more PAGA notices indicates any wrongdoing. Thus, creating a term "High-Frequency Filer" and creating additional legal requirements based on number of PAGA notices filed will not address the issues raised as a basis for the regulation and would instead chill attorneys and law firms from filing over the arbitrary number of 200 PAGA notices, undermining the purposes of PAGA and weakening its intended augmentation of enforcement of the Labor Code.

II. Section 17415(c)'s Proposed Label of "Vexatious Filers" And Creation of Additional Requirements Would Be Directly Contrary to California Law and Policy

Section 17415(d) enables the Agency to designate a person or an attorney as a "Vexatious Filer" requiring the person, attorney and/or the attorney's law firm to be subject to a prefiling screening order. The regulation defines "Vexatious Filer" as "any person or attorney who has repeatedly filed PAGA notices that do not comply with legal requirements, including, but not limited to, on grounds the PAGA notices fail to allege adequately the facts and theories supporting the violations alleged or where the violations alleged are frivolous or appear intended to harass." (Proposed Cal. Code Regs., tit. 8, § 17415(b)(2).)

Thus, the vexatious filer label attaches from the Agency finding a "repeated" failure "to allege adequately the facts and theories supporting the violations."

However, California policy provides a low bar for pleadings and liberally allows for amendment of complaints to maintain actions. The reasoning behind this policy is that at the pleading stage, the party has not yet had a chance to perform discovery and much of the relevant factual proof is in the hands of the employer. The California Supreme Court has recognized that PAGA's notice requirement is subject to the same standards and does not require satisfaction of "a particular threshold of weightiness, beyond the requirements of nonfrivolousness generally applicable to any civil filing." (*Williams, supra,* 3 Cal.5th at 545.)

Indeed, at the pleading stage, parties are not required to be certain of the facts they plead, nor to have to provide any type of certification or judicial notice in support of alleged facts, due to the early stage in the proceedings and the lack of discovery to have occurred to that point. (*Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96, 98-99.)

A proposed rule that would label attorneys or law firms that are deemed to not have provided sufficient facts as "Vexatious Filers" prior to discovery and subjecting them to a pre-filing screening order, would be directly contrary to this law.

Such a punitive rule would have a chilling effect on the filing of PAGA notices and punish those who may be most in need of legal assistance. The types of employees suffering violations supporting PAGA claims are non-exempt employees performing hourly work and are generally unsophisticated or familiar with the law. These employees, who are generally unable to articulate fully the violations they experienced and lack access to documents and witnesses prior to discovery, are entitled to have legal protection nonetheless.

Another issue with the regulation is that it lacks subjective criteria in what must be contained in a PAGA notice to be deemed adequate. This raises due process concerns because: (1) regulated parties should know what is required of them so they may act accordingly; and (2) precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. (*F.C.C. v. Fox Television Stations, Inc.* (2012) 567 U.S. 239, 253.)

The only guidance the proposed regulations provide of what facts and theories must be pleaded is Section 17420(d)(1)(B)'s requirement of:

> A short and plain statement of the facts and theories supporting each violation alleged and personally suffered by the claimant. 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.

The regulations give little guidance on what must be set forth in a PAGA notice to avoid an Agency finding of inadequate notice and potential labeling as a Vexatious Filer.

As an additional due process concern, while a minimal proceeding is laid out in proposed rule Section 17415(d)(b), there are no set standards proposed on what must be established in a response to a potential designation of Vexatious Filer to avoid a label of vexatious filer. This also fails to provide due process.

III. Conclusion

Proposed Section 17415 should not be implemented because it is contrary to California law and policy and fails to address the primary concern of inadequate PAGA notices.

Very truly yours;

LAVI & EBRAHIMIAN, LLP

Joseph Lavi, Esq.

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