WILSHIRE LAW FIRM, PLC
660 S. Figueroa St., Sky Lobby
Los Angeles, CA 90017
Tel: (213) 381-9988
Fax: (213) 381-9989
wilshirelawfirm.com

Sean Paisan, Esq.
John Yslas, Esq.
John Lucas, Esq.
Tyler Woods, Esq.
Nicol Hajjar, Esq.
Thiago Coelho, Esq.
Benjamin Haber, Esq.
Arrash Fattahi, Esq.

March 23, 2026

Via Email Only

Danielle West
PAGA Rulemaking and Policy Analyst
California Labor and Workforce Development Agency
1416 Ninth Street (MIC-55)
Sacramento, CA 95814
Email: Danielle.West@labor.ca.gov
Alisa.Melendez-Collier@labor.ca.gov

Re: Comments on Proposed PAGA Rulemaking

Dear Ms. West,

On behalf of myself and my colleagues at Wilshire Law Firm, we respectfully submit the following comments opposing 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" which respectfully appear to unfairly penalize certain attorneys and law firms, and thus crucially, in turn, workers who seek outstanding representation. Among the issues discussed below, this proposed section 17415 employs pejorative labels and imposes arbitrary limitations on the practice of law that will make it unnecessarily more difficult for California workers to hire the attorney of their choice while vindicating their rights. Respectfully, we believe such regulations of the legal profession are beyond the scope and authority of the Labor and Workforce Development Agency (the "Agency") and otherwise not appropriate for some of the reasons summarized below.

I. Statement of Interest

I write in my capacity as a Senior Partner and the Chair of Wilshire Law Firm's Wage & Hour Class Action Department, which consists of approximately 45 attorneys with a very strong base of experience and history of success in wage and hour practice. We are fierce and ethical advocates for our clients and workers' rights. I and other attorneys in our Wage & Hour Class Action Department have significant AmLaw 100 law firm experience, including at the partner level. We conduct serious litigation work on behalf of California workers. As just one example, in 2025, our firm (including me, as lead trial attorney) tried a class and PAGA action before a judge

and jury in the Los Angeles County Superior Court, where we initially prevailed and ultimately secured a multimillion-dollar settlement agreement after the verdict. We achieved justice and relief for thousands of workers, just as we do in our other matters. We are very proud of the result for the employees we represent and note that very few attorneys and firms in California have litigated and prevailed in a wage and hour class action jury trial on behalf of workers. Last year, our firm also led the charge to seek the successful depublication of the *Allison v. Dignity Health* opinion — a ruling which, if it had remained published, would have significantly hampered class actions for workers. Achieving justice for the workers we represent is of paramount importance to us.

I am a 30-year attorney. Prior to joining Wilshire Law Firm in 2022, I held leadership positions as a partner for several years with three international law firms ranked in the AmLaw 100: Foley & Lardner, Norton Rose Fulbright, and Seyfarth Shaw. This gives me a unique perspective, having served as a defense attorney in prominent national law firms for many years. I have also served two terms as the Southern California Regional President of the Hispanic National Bar Association ("HNBA"), and I am currently a member of the Mexican American Bar Foundation Board of Trustees. I have also served as the National Chair of the Communications Committee of the HNBA and as a member of the Board of Directors of the California Minority Counsel Program. I was also appointed by two mayors and served as a Commissioner with the Los Angeles Civil Service Commission and the Los Angeles Convention Center Commission. I feel a deep, personal responsibility to seek justice and open doors for others in my community. My colleagues at Wilshire Law Firm share similar accolades and values.

We share the Agency's stated concern that there is a need to provide better guidance and clarity for employees and employers about their respective rights and obligations. We offer our comments in the spirit of collaboration, in furtherance of our common goals. While the Agency states in its Notice of Proposed Rulemaking that the proposed regulations are intended to provide "guidance to parties and stakeholders regarding PAGA's prelitigation notice requirements and administrative procedures and to clarify the parties' obligations to the Agency after a PAGA lawsuit has been filed," we are concerned that the proposed regulations go beyond that.[1] As attorneys who are dedicated to protecting the rights of workers and their ability to seek redress in this state, which is the focus of our practice at Wilshire Law Firm, we have reviewed the proposed regulations and provide the following comments in hopes that the Agency will take into consideration our significant concerns, which are stated with due respect and also necessary candor.

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[1] We note that Government Code section 11346.2(b)(4)(A) requires that any proposed regulations must include, as part of the initial statement of reasons for the proposal, "[a] description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives." While we respectfully do not believe the Agency has authority to adopt the proposed regulations regarding "high-frequency" and "vexatious" filers, we also believe that in proposing such regulations, the Agency must provide reasonable alternatives, yet has not done so.

II. High Frequency Filing Does Not Equate to Frivolousness or Lack of Merit

Subdivision (c) of proposed section 17415 imposes arbitrary and unfair limitations on the practice of law as to attorneys and law firms deemed to be "high-frequency filers." This provision would empower the Agency to arbitrarily apply the "high-frequency filer" label to law firms that file 200 or more PAGA notices in a 12-month period. The provision is problematic for several reasons and should not be adopted.

First, respectfully, nothing in the PAGA statute or in law even remotely gives the Agency the authority to regulate the practice of law in this manner. Rather, the PAGA statute assigns the Agency a gatekeeping function: to receive notices and determine whether to investigate. (*See, e.g.*, Labor Code § 2699.3(a)(2)(B) ["[T]he agency may investigate the alleged violation and issue any appropriate citation. If the agency determines that no citation will be issued, it shall notify the employer and aggrieved employee of that decision within five business days thereof by certified mail."].) The Labor Code does not give the Agency the power to decide which attorneys may effectively participate in the enforcement scheme — or, more importantly, to limit the choices California workers have when selecting an attorney. Courts recognize the "constitutional right of access to the courts for all persons" (*Hung v. Wang* (1992) 8 Cal.App.4th 908, 921) and "[t]he important right to counsel of one's choice" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145). The proposed regulations threaten these paramount rights, even if unintentionally. By imposing heightened requirements, prefiling screening orders, and public designations based primarily on filing volume per law firm, the regulation shifts the inquiry from the adequacy of individual PAGA notices to the identity of the law firm representing the filer. Nothing in PAGA authorizes the Agency to condition access to the statutory process on such categorical determinations, particularly where the trigger is numerical activity rather than adjudicated misconduct.[2]

Second, this proposed regulation does not make rational sense because the threshold number of 200 filings in a 12-month period appears arbitrary, as it is not tied to the number of PAGA notices filed by each ***individual*** attorney (which, incidentally, can be for perfectly valid PAGA notices — volume does not mean lack of merit). For instance, this means that a law firm can be deemed a high-frequency filer if it has 40 attorneys who each file five PAGA notices, but a solo practitioner could file 199 PAGA notices alone and not be labeled as a "high-frequency filer" or subject to additional requirements. Thus, as currently written in the proposed regulation, the designation of "high-frequency filer" unfairly punishes and singles out an attorney or firm for filing 200 or more PAGA notices ***even if all the notices are valid and meritorious***. This goes against the primary purpose of PAGA, which is to allow workers, as proxies to the State, to

[2] It also does not make clear the obvious — which is that, of course, even if such provisions were appropriate (respectfully, again, we believe they are not), they cannot be retroactive. Among other things, such retroactivity would be unconstitutional.

vindicate such valid and meritorious claims. Larger law firms (and the workers they represent) should not be punished for their expertise, and workers should not be inappropriately deterred from hiring such attorneys to advocate for their interests.

Interestingly, the Agency excludes nonprofit or legal services organizations from such designation in the proposed rulemaking, on the grounds that such "nonprofit organizations do not share any profit-oriented motivations and often provide critical services advancing public interests, often to underrepresented groups otherwise lacking access to the courts." The Agency erroneously assumes that because an attorney or firm is making a profit for representing workers, those attorneys or firms should be punished for the number of filings, even though for-profit firms often represent the same "underrepresented groups otherwise lacking access to the courts." Moreover, the Agency's proposed exclusion of nonprofit and legal service organizations provides no justification as to whether those organizations are less likely to file allegedly deficient LWDA PAGA notices or cases that lack merit. This further shows the unfair and arbitrary nature of this proposed regulation.

III. Notices Allegedly Lacking Sufficient Specificity Do Not Equate to Vexatious Litigation

The pejorative label "vexatious filer" is also based on the conclusory ground of LWDA PAGA notices that supposedly repeatedly "fail to allege adequately the facts and theories supporting the violations alleged or where the violations alleged are frivolous or appear intended to harass" — a standard that departs significantly from what the term "vexatious" generally means, and which unfairly penalizes attorneys and law firms for supposed pleading deficiencies. Again respectfully, while our law firm always proceeds with meritorious filings and sufficient evidence to proceed, nothing in the PAGA statute even remotely gives the Agency the authority to apply a heightened pleading standard and then adjudge attorneys and law firms as "vexatious." On the contrary, the California Supreme Court has ***rejected*** the idea that an aggrieved employee "must have some modicum of substantial proof before proceeding with discovery" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545), stating: "Hurdles that impede the effective prosecution of representative PAGA actions undermine the Legislature's objectives." (*Id.* at 548.) Imposing a heightened pleading standard for employees giving notice of their claims to the Agency similarly would undermine the legislative intent of PAGA. After all, the purported frivolity or vexatiousness of litigants (which almost always involves the actual plaintiffs, not attorneys or law firms) is, with all genuine respect, for courts to decide. Further, the proposed regulations contain no standards for applying such a label.

Due process is also lacking. While the proposed regulation purports to give law firms and attorneys notice and an opportunity to be heard, this consists of nothing more than a 30-day window to respond to notice that the "vexatious filer" label will be applied. This is insufficient, given the harsh consequences for wage and hour attorneys and the California workers they

represent. Indeed, such a label clearly is a "public attack on an attorney's integrity and motives [that] could seriously impair his or her ability to obtain employment and work effectively within the judicial system." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 652.)

In sharp contrast, Code of Civil Procedure section 391, *et seq.*, governing the circumstances under which a party may be deemed a "vexatious litigant," provides a much more robust due process scheme, including a formal hearing as provided in sections 392.2 and 392.3. Further, such a designation is reserved for a person acting "in propria persona," that is, without an attorney. (CCP § 391(b)(1).) Thus, a party represented by counsel cannot be penalized as a "vexatious litigant" under this provision — typically for that specific party filing numerous actions that lack merit. Yet the Agency proposes to do just the opposite in these regulations, namely, penalize California workers by deeming their attorneys or law firms who have filed actions on behalf of many workers in many separate actions to be vexatious. We are aware of no analogous California law imposing such harsh consequences, without adequate due process, on attorneys and law firms engaged in litigation.

Finally, even if an attorney filed form PAGA letters or otherwise did not technically comply initially with sufficient facts or information, this does not render the case "frivolous" or otherwise lacking of factual support (the term "vexatious" is essentially synonymous with the term "frivolous").[3] Instead, it simply means an attorney or law firm needs to be more specific in a letter, much as a party (not a law firm) may be required to file a more specific amended complaint in court following an adverse ruling on demurrer.[4] Significantly, a court finding of insufficient pleading also follows notice and an opportunity to be heard. Here, in contrast, the Agency purports to deem notices inadequate without sufficient due process. Meanwhile, the Agency has already remedied the supposed insufficiency of notices by proposing that filers use the Agency's form letter, which attorneys must fill out, thereby theoretically (as designed by the LWDA) producing more specific allegations. This substitution of the Agency's proposed form letter for a law firm's supposed form letter should, by itself, eliminate any concerns about suspected vexatious litigation conduct.

* * *

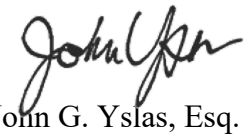
[3] As an aside, just because a defendant contends litigation is somehow frivolous does not make it so. For instance, a defendant may fail to understand its obligations under California law, and that records showing violations exist (or that testimonial evidence shows evidence of violations even if purported records do not). Or a defendant may stubbornly refuse to accept accountability even when a case is resolved due to its unlawful conduct. Defendants are also free to sue for malicious prosecution if, after all of the evidence (not just the nature of the notice) is aired and evaluated. Naturally, as serious attorneys seeking justice, we do not pursue such frivolous litigation.

[4] As a related matter, defendants can also file papers in court, such as a demurrer or summary judgment motion if they truly contend an LWDA notice is defective. It is the courts that have the power to adjudicate such matters, and indeed there exists significant caselaw on this topic.

For all of these reasons, we believe the Agency's apparent efforts which would result in penalizing law firms and attorneys (and in turn, workers — who are of paramount importance), and to regulate the practice of law, are arbitrary, unfair, and unwise — and ultimately harm California workers who count on experienced and highly skilled wage-and-hour counsel to advocate for their rights. Thus, we respectfully believe that the proposed rulemaking in Section 17415 should be omitted.

Sincerely,

WILSHIRE LAW FIRM



John G. Yslas, Esq.