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Jeffrey D. Klein's Public Written Comments Re Proposed Rulemaking

I. Introduction

I submit the below response to the proposed proposed rulemaking currently posted on the Labor and Workforce Development Agency's ("LWDA") website. I greatly appreciate the work the LWDA does, and the vital enforcement power that the Private Attorney Generals Act ("PAGA") provides on behalf of California employees who experience violations in the workplace.

However, as someone who has served as a Head of Litigation in this field for years, overseeing dozens of attorneys who have litigated PAGA cases on a daily basis, the proposed rules I believe trigger a number of potentially significant legal issues. There is a long-standing and complex web of legislative law, case law, policies that underlie California law, and constitutional protections that come into play. Accordingly, I respectfully aim to lay out what I believe are significant legal issues that warrant reconsideration of multiple of the proposed rules.

II. Proposed § 17415: High-Frequency and Vexatious Filers; Additional Notice Requirements and Prefiling Screening Orders

a) Concern #1: The Frequency of Filing Bears No Direct Relation to Any of the Issues Raised in the Notice of Proposed Rulemaking; But Rather, Creates Obstacles and Limitations On Attorneys and Law Firms That Work to Protect Exploited Workers

The issue raised in the Notice of Proposed Rulemaking ("NOPR") is the amount of detail in PAGA notices. The NOPR does not provide evidence that all attorneys or firms that file more PAGA notices fail to provide adequate detail. Nor does the NOPR provide evidence that firms that file fewer PAGA notices provide adequate detail, i.e. it may be there a plenty of lesser filers that file notices with insufficient detail. Nor does the NOPR lay out any attempt by the LWDA

to address with any attorney or firm any instance in which the LWDA attempted to inform the attorney or firm that its notices required more detail, but that change failed to happen. Nor did the NOPR lay out even a single example in which it found even a single PAGA notice to be frivolous, i.e. to not have merit.

The issue raised is that the LWDA would like more detail. That has nothing to do with how many notices a firm files. A large Intellectual Property law firm files far more patent applications than a smaller firm, or a firm that does not specialize in patent law. Numbers could be used to single out these larger firms. Yet there would be nothing wrong with them filing a significantly larger number of patent applications. Quantity is indicative of nothing but quantity. Whether those patent applications are frivolous or non-frivolous would be a separate determination.

Indeed, amount of detail provided would not be indicative of anything but the amount of detail provided. If Intellectual Property firms were only required by the legal pleading standard to provide basic detail in patent applications, then providing such basically-detailed applications would be indicative of nothing but procedural efficiency.

There are more than nearly two million private sector employers in California. (*See* Employment Development Department website, Size of Business Data – 2015-2024, https://labormarketinfo.edd.ca.gov/lmid/size_of_business_data.html .) This, as the NOPR notes, is why PAGA exists. Before PAGA was enacted, "The Labor Commissioner and other agencies were likewise hampered in their enforcement of civil penalties by inadequate funding and staffing constraints." (*Kim v. Reins Int'l Cal., Inc*., 9 Cal. 5th 73, 81 (2020).) Thus, "[t]o facilitate broader enforcement, the Legislature enacted PAGA . . . ." (*Id*.)

Simply put, there are far too many potential violators for the LWDA to monitor or investigate. As the court said in *Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554 (2007) ("*Belaire-West*"), [A]t stake here is the fundamental public policy underlying California's employment laws. "'[T]he prompt payment of wages due an employee is a fundamental public policy of this state.'" (*Id*. at 562.)

To fill this void, a variety of citizen attorneys stepped forward to do this vitally important work Some citizen attorneys stepped in to start smaller practices, while other citizen attorneys stepped in on a larger scale. The NOPR does not even assess how many attorneys a firm may have, i.e. whether larger filing firms may have forty attorneys; nor whether one attorney's name may appear on more notices because a law firm operates in a compartmentalized manner, i.e. some attorneys at the firm devote their entire practice to intake and drafting of PAGA notices, counting on dozens of other attorneys at the firm to carry out the litigation. Such business choices may allow larger scale operations, allowing those attorneys or firms to help more Californians who are being exploited in the workplace.

Nothing about a firm choosing to help more employees by hiring more attorneys, or choosing operational efficiency, indicates any wrongdoing. Indeed, it indicates the opposite: that law firm stepping up to help as many exploited employees as possible.

What must not be lost here are the egregious alleged violations these firms are taking on:

- a paving company allegedly forcing employees to work shifts as long as twenty-two (22) hours without any meal or rest breaks, telling employees to add a thirty-minute meal period to every shift on their cards to create the appearance meals were provided;

- farm workers allegedly being made to put synthetic time entries on their time sheets that do not reflect actual time worked;

- sales employees allegedly being misclassified as independent contractors, and that being used as an excuse to make them purchase thousands of dollars in equipment with their own funds;

- nurses working long shifts without required breaks;

- sweat shop type textile operations not providing breaks or paying for all hours actually worked.

The list goes on and on. While above some egregious alleged violations are listed, California law and policy hold that no violation is too small to warrant liability. (*Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 847 (2018).) In reality, the number of filings listed is a drop in the bucket compared to the violations that likely exist.

Yet the NOPR seeks to attack citizen attorneys who seek to help the greatest number of employees.

On the other hand, the NOPR does not single out large defense firms that defend alleged violator after alleged violator. Indeed, if the LWDA ever observed the Answers defense firms file in PAGA cases, they would notice a pattern: virtually every single Answer filed by defendants consist of fact-free, unspecific, and often inapplicable purported affirmative defenses. "Unclean hands and/or laches and/or waiver" are asserted without a single fact, nor even saying which applies. Why is quantity not an issue for defense attorneys, but someone is for those who help employees?

California has more than 15,000,000 private sector employees (https://agri.assembly.ca.gov/system/files/2025-10/ppic-california-s-businesses.pdf) and millions of employers. How does it serve a statute that was created to provide broader enforcement of California's strong employment, in a state that wants to effectuate code enforcement for even small violations, by attacking those attorneys and firms that seek to help effectuate this enforcement the most? 2,086 complaints is likely a drop in the bucket of the alleged violations that need to be addressed each year.

Numbers. They are reflective of something. The more LWDA notices an attorney or firm files a year, the more aid they may be giving to the Labor Commissioner in protecting California's more than 15,000,000 private sector employees. Such attorneys and firms should be thanked and supported, not attacked, labeled, and subjected to elevated legal hurdles.

Thus, creating a term "High-Frequency Filer" and creating additional and separate legal requirements for such attorneys both has no basis in any of the issues raised the NOPR, and would be directly counter to the California law and policy, and the policies underlying PAGA itself.

b) Concern #2: Labelling of Attorneys and Firms Who File More PAGA Notices "High-Frequency Filers", and Creating Additional Requirements for Those Filers, Is Likely to Violate the Equal Protection Clause of the U.S. Constitution

As discussed in Section II.a) above, the proposed rules regarding "High-Frequency Filers" would single out, label, and create additional legal requirements for plaintiff-side PAGA notice filers, simply based on the number of PAGA notices filed. On the other hand, the proposed rules do not propose to label or create additional legal hurdles for attorneys or law firms that defend against a large number of PAGA notices – no matter how many cases employer-side attorneys and firms defend annually, or how overtly fact-free and even baseless their Answers may be, or even if they again and again defend extreme violators.

The immediate issue arises: how can a rule be issued that undercuts the ability of employees in California to have access to larger firms to fight on their behalf, while the employer-defense side is left free to have massive firms, with hundreds or even thousands of attorneys, defend them on as voluminous basis as they see fit? While the story of David vs. Goliath is one for the ages, Equal Protection under the U.S. Constitution does not allow one side to have a right to such legal advantages.

Should legal challenges be raised to this proposed rule, the LWDA would have to explain why aggrieved employees – who are made up in no small part by People of Color, immigrants, many of whom have limited English-language skills, and people with lower incomes, are not entitled to have sizeable firms with adequate numbers of attorneys and the resources that come with scale, to litigate on their behalf. Meanwhile, the employers they go up against, which can and do consist of the largest, wealthiest companies on the planet, are free to have the benefit of the world's largest firms to defend them Employees have a right to be represented by law firms that are large enough to stand toe-to-toe with the large defense firms. Depriving them of that right, as the proposed rules that affect "High-Frequency Filers" would, would be to deprive employees of Equal Protection.

Accordingly, the proposed rule that would label "High-Frequency Filers," on the employee-side only, and create additional legal hurdles for such filers – again, on the employee-

side only – would very likely fail if challenged under the Equal Protection Clause of the U.S. Constitution.

c) Concern #3: Labelling of Attorneys and Firms Who File More PAGA Notices, and Creating Additional Requirements for Those Filers, Is Likely to Violate the Due Process

As discussed in Section II.a) above, the proposed rules regarding "High-Frequency Filers" would single out, label, and create additional legal requirements for plaintiff-side PAGA notice filers, simply based on the number of PAGA notices filed. This would happen – as also discussed – without regard to whether even a single one of the PAGA notice filings had any defect of any kind.

Such a singling-out and creating a separate legal regime for a group without any finding whatsoever would be a complete lack of the most basic Due Process protections for these attorneys and law firms, as well as for the employee-clients who are seeking protections through them. The labelling of and creating additional legal hurdles for attorneys and firms that have not had any direct finding against them directly, again, would be a plain violation of Due Process.

Due Process must be provided to the attorneys, law firms, and employees who seek protection through them, because parties cannot simply be made to face labels and higher-legal burdens unique to them without any chance to defend themselves against any allegations that supposedly justify such additional burdens. What is proposed in the rules would amount to, in effect, a significant sanction without any requirement of finding.

Accordingly, the proposed rule that would label "High-Frequency Filers," on the employee-side only, and create additional legal hurdles for such filers, without even a single allegation being made against the specific attorneys or firms of actual wrongdoing of any kind, never mind any chance to defend against any such allegation should one arise, would very likely fail if challenged under the Due Process Clause of the U.S. Constitution.

d) Concern #4: The Proposed Additional Legal Requirements for "High-Frequency Filers" Under Proposed § 17415(c) Would Be Directly Contrary to California Law and Policy

Proposed Rule #17415 includes elevated requirements at the pleadings stage, such as laid out in the Proposed Rule #17415(c). The rules that require additional language and certifications even the pre-pleading PAGA notice stage would be directly contrary to more than a century of California law and policy.

For more than one-hundred and twenty-five years, California has had, and maintains, a policy that creates a low bar for pleadings, and that liberally allows for such things as the amendment of complaints so as to maintain actions. This is because, at the pleading stage, the party has not yet had a chance to do discovery.

As the Supreme Court of California said in 1901, "It is the policy of the law for courts to be liberal in allowing amendments to pleadings and proceedings . . . ." (*Carter v. Lothian*, 133 Cal. 451, 452 (1901).) Again and again since then, the California Supreme Court has repeated and expanded upon this protection at the pleading stage.

Even when a demurrer has been granted, such as when a pleading lacked sufficient facts to support a cause of action, under California law and policy, should liberally be granted leave to amend. As the Supreme Court of California held plainly in 1941:

> Nor is this liberal policy of permitting amendments in furtherance of justice any different merely because a general demurrer for failure to state a cause of action has been sustained. For the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action.

(*Klopstock v. Superior Court of S.F.*, 17 Cal. 2d 13, 19-20 (1941).) The Supreme Court of California then reiterated and made clear, in 1974, and again in 2003, that:

> It is axiomatic that if there is a reasonable possibility that a defect in the complaint can be cured by amendment or that the pleading liberally construed can state a cause of action, a demurrer should not be sustained without leave to amend.

(*Minsky v. Los Angeles*, 11 Cal. 3d 113, 118, (1974); *see also Lantzy v. Centex Homes*, 31 Cal. 4th 363, 386 (2003).) Indeed, at the pleading stage, parties are explicitly 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:

> [W]hen a pleading alleges facts sufficient to constitute a cause of action, what we think we know—beliefs not yet appropriately subject to judicial notice—has never been a proper basis for concluding, as a matter of law, those alleged facts cannot be true and, on that ground, sustaining a demurrer without leave to amend.

(*Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co*., 81 Cal. App. 5th 96, 98-99, 296 Cal. Rptr. 3d 777, 779 (2022).) Yet, the rules being proposed in this section seek to first label the attorney or law firm as a "High-Frequency Filer" with a required notice in bold, without any finding against that attorney or law firm, and then to require a certification by the aggrieved employee that is directly contrary to the above California law and policy, and indeed, contrary to the basics of pleading. Requiring such a certification at this early pleading stage is directly contrary to more than a century of California law and policy regarding the pleadings stage.

Indeed, California law and policy regarding PAGA has reflected the same. As discussed above, the lead case on PAGA notice standards held that "minimal fact supports the alleged

violation, making the [PAGA] Notice adequate for the alleged violation . . . ." (*Brown*, *supra*, 28 Cal. App. 5th at 838.) Further, the Supreme Court of California has made clear, specifically in the PAGA context, that a party does not even need to know all of the facts or violations at the pleading stage, as that is the entire point of discovery:

> California law has long made clear that to require a party to supply proof of any claims or defenses as a condition of discovery in support of those claims or defenses is to place the cart before the horse . . . ***"California law permits the use of discovery to get information necessary to plead a cause of action"*** (id. at p. 11); **it also permits the use of discovery to determine whether an individual dispute is only a drop in the pond and a broader representative action is warranted.** . . .
>
> **It follows that a party allegedly subject to an illegal employment policy need not already have direct, personal knowledge of how prevalent that policy is** to seek contact information for other employees that may allow the plaintiff to determine the proper extent of any representative action.

(*Williams v. Superior Court*, 3 Cal. 5th 531, 551-52 (2017) (emphasis added).) This is because, prior to discovery occurring, a defendant has "a monopoly on access" to witnesses and vital information, which "artificially tilt[s] the scales" in favor of those defending alleged violating employers prior to discovery occurring. (*Id*. at 544.)

As the PAGA notice stage is pre-discovery, the reason notices will have less facts and detail is precisely because the employer often has a monopoly on access to witnesses and documents. Attacking the notices, which meet the minimal standard, without allowing for discovery to obtain additional facts, would be directly contrary to binding California law.

One need not have the facts clear at pleading. Rather, "the various instruments of discovery now serve (1) as a device . . . to narrow and ***clarify the basic issues between the parties***, and (2) ***as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues***." (*Greyhound Corp. v. Superior Court of Merced Cty*., 56 Cal. 2d 355, 385 (1961) (emphasis added).)

The rules proposed by the LWDA here would be directly contrary to all of this law and history, which seeks to have litigation play out based on the merits. To have that occur, California law and policy allows those who seek to file cases to move past the pleading stage into discovery with only minimal fact required, and, indeed, potential uncertainty about the facts alleged.

Thus, the question arises, how can a rule survive legal challenges that seeks to get a certification of certainty of facts even at the pre-pleading stage, when lack of certainty of the facts alleged in a complaint "has never been a proper basis [for] sustaining a demurrer without

leave to amend"? (*Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co*., 81 Cal. App. 5th at 98-99.)

Accordingly, the proposed rules under § 17415(c) that would require "High-Frequency Filers" to provide certain notice on filings, and for their plaintiffs to provide certifications at the notice stage, are directly contrary to more than a century of California Supreme Court holdings, and California law and policy on standards at the pleadings stage. Thus, such rules would be unlikely to stand up to any potential legal challenges.

e) Concern #5: The Proposed Additional Legal Requirements for "Vexatious Filers" Under Proposed § 17415(d) Would Be Directly Contrary to California Law and Policy

For the same reasons discussed in Section II.d) above, the proposed rules under § 17451(d), which would provide a label of "Vexatious Filer" and heightened legal standards if their PAGA notices are deemed to lack adequate facts, would be directly contrary to California law and policy.

California law, rather than labeling an attorney or law firm that files a complaint that is subject to a sustained demurrer, instead are to liberally allow leave to amend. This is explicitly the case with pleadings that lack sufficient facts:

> Nor is this liberal policy of permitting amendments in furtherance of justice any different merely because a general demurrer for failure to state a cause of action has been sustained. For the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action.

(*Klopstock v. Superior Court of S.F*., 17 Cal. 2d 13, 19-20 (1941).) The proposed rule that would label attorneys or law firms that are deemed to not have provided sufficient facts as "Vexatious Filers," and subjecting them to a pre-filing screening order, would be directly contrary to this law.

Such a punitive rule would likely have a chilling effect on the filing of PAGA notices. California law and policy flows, as discussed in Section II.d) above, from the understanding that filing parties often need to conduct discovery in order to be able to fill additional facts in. Again and again, for more than one-hundred and twenty-five (125) years, the California Supreme Court has had that amendment, in particular for lack of sufficient facts, should be liberally allowed – ***not*** that those who file pleadings with insufficient facts should be labeled and subject to a separate legal regime going forward.

To create additional barriers to those who may file insufficient PAGA notices or complaints would be to punish those who may be most in need of legal assistance. An employee who is not a legal expert, who may be frightened of retaliation and/or being negatively affected in their career going forward, who may have difficulty understanding the nuances of California

law, who may not be able to articulate fully the violations they experienced at the pleading stage, and who has minimal if any access to documents and witness at the pleadings stage, are entitled to have legal protection nonetheless. They cannot and should not be punished for not being as verbose or as good at legal and factual articulation as may be ideal.

To judge pleadings on such things as how well-written they are, and how well they initially meet standards prior to any leave to amend, is to punish both the most vulnerable among us, as well as to punish attorneys who seek to help these employees. An average, earnest, hourly non-exempt employee may not have kept track of all the facts that detail violations of California law, which are very detailed and specific. They – and their attorneys – cannot be labeled and punished for not having more than minimal fact at the pleading stage. More than a century of California law says the only consequence is liberal leave to amend. Thus, the proposed rules for § 17415(d) would likely fail if challenged under the law.

f) Concern #6: The Proposed Additional Legal Requirements for "High-Frequency Filers" and "Vexatious Filers" Under Proposed § 17415(c) and (d) Would Likely Not Hold Up To Challenges Under Equal Protection

As discussed in Sections II.d) and II.e) above, the proposed rules regarding "High-Frequency Filers" and "Vexatious Filers" would be directly contrary to more than a century of binding California law and policy.

The question would have to be answered: how could employee-side attorneys and law firms face potential labelling an elevated pleading-stage standard, with potential punitive legal consequences for basic pleading issues that are supposed to lead to nothing but leave to amend, while employer-side firms are free to file as many completely factless Answers and other initial pleadings as they wish without any label or other consequence? As discussed above in Section II.b), Equal Protection under the U.S. Constitution does not allow one side to have a right to such legal advantages while another side is subject to systemic legal disadvantage.

This becomes even more relevant when the attorneys and law firms being singled out are those that represent, in no small percentage, People of Color, immigrants, many of whom have limited English-language skills, and people of lower incomes. Why is it these groups will be made to certify their pleadings, while wealthy defendants will not have to? Why will their attorneys be subject to labelling and heightened legal requirements, while the attorneys for wealthy defendants will not? How can such a potentially discriminatory disadvantage be justified? How does that comply with Equal Protection under the law?

Accordingly, the proposed rules under § 17415(c) and (d) that would label and create heightened legal burdens for "High-Frequency Filers" and "Vexatious Filers" on the employee-side only, would very likely fail if challenged under the Equal Protection Clause of the U.S. Constitution.

g) Concern #6: The Proposed Additional Legal Requirements for "High-Frequency Filers" and "Vexatious Filers" Under Proposed § 17415(c) and (d) Would Likely Not Hold Up To Challenges Under Due Process

The same issues discussed in Section II.f0 above would exist under § 17415(c) with regard to Due Process, as attorneys and law firms may be labeled without any basis, finding, or proceeding. Such a labelling with no Due Process would be unlikely to hold up if challenged.

Additionally, while a minimal proceeding is laid out in proposed rule § 17415(d), there are no set standards proposed. Indeed, there is only one vague paragraph in the definitions section that hints at what may cause only employee-side attorneys to be labelled vexatious filers.

The terms laid out are entirely unclear, subjective, and could potentially be used in an arbitrary manner. California law, as discussed in detail above, lays out that not alleging adequate facts has no consequence, but should only lead to leave to amend. Yet this rule says that – only for employee-side attorneys and law firms – "PAGA notices that do not comply with legal requirements" such as failing to "allege adequately the facts and theories supporting the violations alleged" will lead the attorneys or law firms being subject to potentially consequentially, detrimental hearings.

To be clear: being potentially subject to these hearings in and of themselves is consequence that the employee-side attorneys and law firms would be subjected to without Due Process or any finding whatsoever, i.e. if you take a case on behalf of employees, you face the risk of a hearing and potential labelling and other consequences – without regard to anything the attorney has done. That is a complete lack of Due Process. Attorneys who help employees are subject to potential hearings, label, and other consequences, period; while those who defend employers are not.

Add to that that the hearings and potential labelling and consequences would be based on one vague paragraph, and the appearance of a lack of Due Process is strengthened. Instead, the rules may appear to be a purely arbitrary procedure. Combined with the potential Equal Protection issues laid out above, the overall appearance may be that the rules would create an arbitrary targeting of attorneys who seek to help employees, who in now small part consist of People of Color, immigrants with limited English-language skills, and individuals with lower incomes.

Accordingly, the proposed rules under § 17415(c) and (d) that would label and create heightened legal burdens for "High-Frequency Filers" and "Vexatious Filers" on the employee-side only, would very likely fail if challenged under the Due Process Clause of the U.S. Constitution.

g) The Proposed Rules Under Subchapters 3 and 4 Have Due Process and Equal Justice Issues Due to Merits Determinations Being Made Prior to Discovery Occurring

As discussed above, prior to an employee being allowed to conduct full, broad discovery, there is an unfair, one-sided imbalance, as the employer has a "monopoly" over witnesses, documents, and other relevant information. The cure processes fail to provide for employee-side discovery before determining what would constitute a cure, and whether a cure is sufficient.

Thus, in line with the discussion above, employees are not given a fair chance, as provided for by California law and policy, to do discovery to lay out facts that may show proposed cures are insufficient, additional violations and theories underlying violations exist, and thus get to truly have the violations experienced considered, and Due Process in determining what constitutes a cure, and whether or not the cure was sufficient.

This imbalance due to a lack of discovery creates an Equal Protection issue as well, as giving the employer side the massive advantage of pre-discovery merits determinations allows the employer "monopoly" on witnesses and documents to create a massively uneven balance, that puts employees – no small percentage of whom are People of Color, immigrants with limited English-language skills, and people with lower incomes, at a significant disadvantage, thus denying them Equal Protection.

Also, there are issues in the cure process in which the LWDA may seek information directly from the employee, rather from through their counsel and/or deny their counsel the right to typical objections and other client protections during the cure process. Such process issues denies both Equal Protection and the basic right to counsel. Thus, the Cure Processes as laid out likely have significant Equal Protection and Due Process issues, as well as issues relating to the right of a party to have counsel represent them.

h) Proposed Rule § 17420.5(d) Undercuts The Entire Purpose of California Policy Favoring and Encouraging Settlement

The Supreme Court of California has stated plainly that there is "strong public policy of this state favoring settlement of actions." (*Monster Energy Co. v. Schechter*, 7 Cal. 5th 781, 793 (2019).) Indeed, the Supreme Court has held for more than 125 years that settlements "are highly favored as productive of peace and goodwill in the community, and reducing the expense and persistency of litigation." (*McClure v. McClure*, 100 Cal. 339, 339 (1893).)

The proposed rule for § 17420.5(d) disregards this long-standing and vital policy. As discussed above, in *Williams v. Superior Court*, the Supreme Court explicitly stated that discovery could be used to "to get information necessary to plead a cause of action . . . ." (*Williams v. Superior Court*, 3 Cal. 5th at 551-52 (2017).) The Court noted that California law "also permits the use of discovery to determine whether an individual dispute is only a drop in the pond and a broader representative action is warranted." (*Id*.)

As the Supreme Court held in *McClure*, settlement allows the parties to avoid the expense and persistency of litigation. This means, instead of having the great expense and significant time required to undertake formal discovery to find additional potential violations, theories, or

causes of action, the parties can reduce expenses and shorten the process by going directly into confidential, informal settlement discussions.

Just as plaintiff may learn of additional violations, theories, or causes of action through formal discovery, a plaintiff may learn of the same through the settlement discussion process. To implement the proposed rule § 17420.5(d) would be to directly contradict the long-standing California law and policy favoring settlement. If the information learned in settlement discussions cannot be used as part of the settlement discussions, there basically would be no point to settlement discussions. The saving of expense and time would be lost, as a plaintiff would have to go through the formal discovery process in order to gain all information on all potential violations prior to settlement discussions, lest plaintiff not be able to negotiate regarding new facts or theories learned during those discussions.

If enacted, the proposed rule would make it impossible to have early settlement discussions, as any violations learned of could not be settled. Rather, either the case would have to continue on to pursue the new violations or theories learned, or require and additional case to be filed, since the rule would not allow them to be added to and thus settled in the current case's settlement. In effect, the proposed rule specifically targets and seeks to eliminate the advantages of settlement discussions laid out by the Supreme Court of California repeatedly over the last century and a quarter.

Just as parties can find additional facts, theories, and causes of action through formal discovery, and are allowed to add any found to the case through amendment of the PAGA notice and/or complaint, in order to be in compliance with California law and policy favoring settlement, the parties have to be allowed to make the same such amendments when new facts, theories, or causes of action come to light during settlement discussions.

As such, the proposed rule § 17420.5(d) should not be enacted, as it is unlikely to stand challenges that it violates California law and policy.

i) The Legislature, Through Great Deliberation and Debate By Elected Officials, Have Already Provided Any Needed Amendments to PAGA, and the Proposed Rules Would Unnecessarily and Improperly Override the Legislatures' Conclusions and Result

As noted in the NOPR, the California Legislature recently considered any issues relating to the PAGA statute. Through significant debate and deliberation, the legislature arrived at amendments in a manner that these elected officials concluded properly balanced the various parties' interests and properly resolved any outstanding issues. Thus, the proposed rulemaking by the LWDA would likely be seen as an improper attempt to override the Legislature's conclusions and legislation, and very possibly fail any challenge that raises the issue the new proposed rules are contrary to the Legislature's conclusions and the bill that passed.

III. Conclusion

For the above stated reasons, Proposed § 17415: High-Frequency and Vexatious Filers; Additional Notice Requirements and Prefiling Screening Orders should not be implemented. There is no issue laid out in the NOPR that the rules relate to. Additionally, the proposed rules would be contrary to California law and policy, and would likely fail challenges under Equal Protection and Due Process.

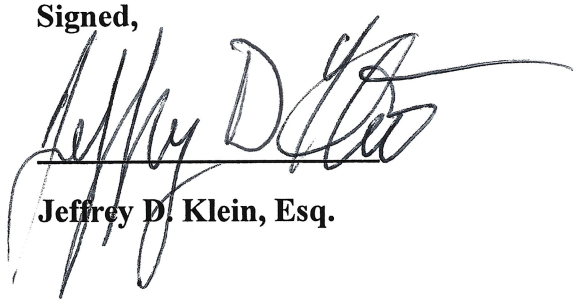
Without any issue laid out as to actual filings that lack merit, and with California law and policy already set up to address any issues with pleading-stage filings with liberal leave to amend, and no punitive or labelling set up, no additional rules are needed at this time. Indeed, the California Legislature recently provided detailed amendments to the PAGA statute, after a deliberative process by elected officials that balanced the interests of the various parties and addressed the issues they concluded should be addressed, as these elected officials chose to address them. Such a legislative process, that only occurred recently, would be in effect overridden by the proposed rules, and thus would likely fail any challenges to the rules based on the recently passed amendments.

The best path forward is for the LWDA to work with its partnership with employee-side attorneys and firms that file PAGA cases. Nothing in the NOPR indicated such basic first steps as having partnership-type calls with firms that the LWDA wishes to see some changes in practices from. Without even having attempted to discuss any of the topics raised, and with no substantive issues raised, and with California law and policy already in place to address any issues should they arise, and with issues related to Equal Protection and Due Process raised by the proposed rules, the most reasonable first step would be for the LWDA to have discussions with attorneys and/or firms who file PAGA notices and complaints, to informally discuss providing notices that work for all parties, while staying within the bounds of California law and policy, and constitutions protections.

Additionally, there are significant issues with the proposed changes to Chapters 3 and 4 that create issues under Equal Protection and Due Process. Further, the proposed rule § 17420.5(d) should not be enacted, as it is unlikely to stand challenges that it violates California law and policy

For all of the above reasons, the proposed rules should not be implemented.

Signed,



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