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April 9, 2026

VIA EMAIL: Danielle.West@labor.ca.gov

Danielle West
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Labor and Workforce Development Agency
1416 Ninth Street (MIC-55) Sacramento, CA 95814

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:

Proposed Comments to 2026 PAGA Amendments

Littler Mendelson, P.C. submits the following comments to the proposed regulatory language of California Code of Regulations, Title 1, Section 8, Chapter 9, Labor Code Private Attorneys General Act of 2004 (“PAGA”) Subchapter 1, proposed Section 17410.5 (as reflected in OAL Notice File Number Z2026-0121-03). The proposed language is:

§ 17420.5. Subs (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.

Littler Mendelson, P.C. (“Littler”) is the largest management side labor and employment law firm in California and routinely handles several hundred PAGA actions at any one time on behalf of California employers. Littler believes that the above amendment will materially impede the settlement of PAGA actions, which is by far the most common means of resolving such actions.

PAGA does not operate as traditional *qui tam* actions do, in that it allows an unlimited number of employee-plaintiffs to separately bring PAGA actions for similar or even identical alleged Labor Code violations. The only pre-requisite is that a potential PAGA plaintiff provide written notice to the Labor and Workforce Development Agency (“LWDA”), setting forth the specific provisions of the Labor Code alleged to have been violated (the “PAGA Notice”). (See Lab. Code § 2699.3(a).) Any number of plaintiffs may submit a PAGA Notice to the LWDA. And of course,

any one plaintiff may not allege every possible legal violation arising from the same facts in a single PAGA Notice. However, employers trying to secure litigation peace for a single employment decision or practice in a discrete time period can only do so based on how the PAGA claim they face is actually pled in the PAGA Notice. For example, an employee may allege a claim for unpaid overtime wages as a result of an employer allegedly failing to include additional non-discretionary incentive pay into the regular rate of pay for overtime, but not allege claims for meal or rest period violations arising from that very same alleged failure. Those meal and rest period violations may appear in some other plaintiff's PAGA action or may be part of some future action covering the same time period. No employer would settle the claim for PAGA penalties triggered by the alleged unpaid wage claim, only to then be exposed to a new suit by that same employee or a similarly situated employee suing separately for PAGA penalties arising from meal or rest break violations. To date, settling litigants have solved for this problem by amending their PAGA Notice and complaint to cover additional claims arising from the operative facts alleged in the original PAGA Notice.

Proposed Section 17420.5(d), as written, is materially ambiguous and lacks clarity. As written, proposed Section 17420.5(d) would prohibit a PAGA claimant from amending their PAGA Notice "as part of, or at any time after the litigants have reached, a proposed settlement." However, it is entirely unclear what is meant by this phrase. For instance, is an amended PAGA Notice filed after the parties agree to mediate but before the mediation occurs "part of...a proposed settlement"? Does the answer depend upon whether the amended Notice was prompted by something the plaintiff's counsel saw in a pre-mediation document produced by the defendant or was prompted by the defendant's assertion that any settlement would have to release additional specified claims? Is a "proposed" settlement reached when the litigants gather for a formal mediation? Or is it when they start drafting a settlement agreement and negotiating its terms and conditions? Or is it when the litigants formally execute a PAGA settlement agreement? Or is it something else?

Prohibiting such amendments to PAGA Notices after settlement talks are initiated would materially chill settlements of PAGA actions. First, the need to cover other similar claims commonly only comes up in settlement discussions, when detailed information is exchanged often for the first time. Second, assessing when a "proposed settlement" discussion was initiated or reached could require invading the mediation privilege and encroach upon the inadmissibility of settlements under California Evidence Code Section 1152 (or the corresponding Federal Rules of Evidence, Rule Rule 408). Third, the LDWA can always independently act on the amendment when an amended PAGA Notice is filed, or the LWDA can challenge the settlement based on the amended PAGA Notice on its merits. However, preventing litigants from securing as wide a release as possible is antithetical to existing law. (See *Villacres v. ABM Industries, Inc.* (2010) 189 Cal.App.4th562 [a landmark California appellate case holding that a court-approved class action settlement that releases wage-and-hour claims – including PAGA penalties – bars employees from filing subsequent lawsuits for the same claims even if the subsequent claims were not alleged in the prior action].) Consequently, Littler contends the word "proposed" in subsection (d) of Section

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17420.5 is ambiguous, and to ensure clarity to all PAGA litigants, should be stricken, such that the only logical reading of subsection (d) is that there should be no amendment to a PAGA Notice after the litigations have formally executed a PAGA settlement agreement.

For those reasons, we propose this subsection be stricken from the amendments to read as follows:

§ 17420.5. Subs (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.

Thank you for your consideration.

Sincerely,



Marlene S. Muraco
Shareholder

MSM
4937-4277-8119.1 / 119029-1001