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<u>Jeffrey D. Klein's Public Written Comments Re Modified Proposed Regulatory Text</u>

I. Introduction

I submit the below response to the Modified Proposed Regulatory Text 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.

As the LWDA has modified its proposed rules, and refined the target of its proposed rules, some simple, important additional changes can help the LWDA achieve its goal while avoiding undercutting its own mission and penalizing firms that act in good faith to further that mission.

II. Addition of Proposed § 17420(h) Is Helpful But Must Be Required Rather Than Optional, As Otherwise § 17415(d) Does Not Comport With The Modified Proposed Definition of "Non-Compliant Filer" In § 17415(b)(1)(B)(2).

The modified proposed rules proposed to add § 17420(h), which would states that the LWDA "may" give notice to a filer of purported deficiencies in a filed notice, and provides up to 30 days to amend the notice to correct any such deficiencies.

This modification to the proposed rules appears directly responsive to an issue raised: it is supposed to be a partnership between the LWDA and those who help it enforce California law. The proper first step, before labeling any filer, would be to communicate. This proposed addition would add that to an extent.

However, this should be a standard, required first step for the LWDA, not an optional step that the LWDA "may" take if it chooses. Filers should not be made to guess what is sufficient, and immediately be punished if they fail to guess correctly, or make an incorrect assumption in a single instance.

The rules as currently proposed, in § 17415(d), allow the LWDA to move directly to deeming a filer non-compliant without even once giving the attorney notice of how their filings may fall short, and having a chance to correct their filings. While § 17415(d)(1) provides an opportunity to be heard, there is no opportunity for an attorney to correct any issues laid out the LWDA notice provided for under § 17415(d)(1)(A). Thus, even if an attorney has made an honest, good faith attempt to provide a compliant notice, and never has received any notice of deficiencies previously, the rules as proposed do not allow for even a single chance for attorneys or law firms to learn from the type of notice now provided for in § 17420(h) before being dubbed a non-compliant filer under § 17415(d).

Attorneys and law firms should not be in a position in which single wrong assumption of what to include can lead to derogatory labeling and prescreening order requirement without even a single warning and not a single chance to amend first. Also, think of an attorney who filed compliant notices 50 times in a row, but then files one the LWDA thinks is insufficient. There must be notice and chance to correct before any labelling and consequence.

<u>Indeed, the modified proposed definition of "non-compliant filer" in proposed § 17415(b)(1)(B)(2) lays out that only an attorney that either has filed "three or more" deficient PAGA notices in the preceding 12-month period, or filed a non-compliant notice frivolously "and . . . continued to file non-compliant notices after warning by the agency," will fit the definition of "non-compliant." Yet that definition has not been worked into the actual proposed rules.</u> As it stands, proposed § 17415(d) allows an attorney or firm to be labeled non-compliant in a first instance with no prior warning, as long as hearing is provided – directly contrary to the proposed definition. Thus, the below proposed further modifications appear to be necessary to bring the proposed definition in line with the proposed rules.

Proposed Further Modification: make newly proposed § 17420(h) mandatory, with the derogatory labelling and punitive procedures laid out proposed § 17415(d) only applicable after the LWDA exhausts the below requirements (proposed further modifications in bold):

> (h) The Agency **will** provide written notice to a claimant or claimant's representative of deficiencies in a PAGA notice filed with the Agency. The Agency's written notice shall identify the manner in which the PAGA notice fails to comply with the requirements of Labor Code section 2699.3 and applicable regulations and provide the claimant up to 30 days to amend the notice. **~~The Agency's failure to issue a written notice under this subdivision shall not be construed as a determination concerning the sufficiency of any PAGA notice filed with the Agency. This subdivision is intended to be declaratory of existing law and Agency authority.~~**

This should be combined with the below proposed further modification to 17415(d)(1) (proposed modifications in bold):

> (1) No person or attorney may be designated a ~~vexatious~~non-compliant filer without**: having been given notice of deficiencies under § 17420(h) at least 3**

> **times in the preceding 12-month period, and failed to correct the deficiencies, or having been given a warning of frivolous or harassing notices and continued to file non-compliant notices; and without** being given notice and an opportunity to be heard **regarding any current purported deficiencies**.

The standards for required PAGA notice content laid out in proposed rule § 17420(d) are not without lots of room for interpretation and guesswork. For example, § 17420(d)(2)(B) requires "A short and plain statement of the facts and theories supporting each violation alleged and personally suffered by the claimant." (*Id.*) While there is some additional explanation, there is still lots of room for attorneys and firms to have views of what may be sufficient that may not line up at times with the LWDA attorney or staff member reviewing the notice.

The above-proposed further modifications prevent attorneys and firms that are acting in good faith from suffering significant consequences for a single good-faith instance of not quite getting the standards right in the LWDA's view. The consequence for having a different interpretation of such general language on even a single instance should not be punitive. Instead, if the proposed further amendments above are inserted, there would be opportunity for the attorney or firm to learn what the LWDA requires, and correct any deficiencies. Only a failure to correct any deficiencies or repeated failures to adjust to the LWDA's standard could potentially lead to consequence.

Thus, as currently written, the proposed definition in § 17415(b)(1)(B)(2) does not comport with §§ 17415(d) or 17420(h). Rather, it creates punitive consequences for even a single instance of even a good-faith attempt to comply that is deemed non-compliant.

To note, I stand by my initial comments, submitted on March 23, 2026 (See Jeffrey D. Klein's Public Written Comments Re Proposed Rulemaking ("Klein Initial Comments"), §§ II.(c)-(e)) which note that the standard for more than 125 years under California law if to liberally allow amendment, including when there is a lack of facts. Thus, punitive consequence that affects an attorney rather than just a particular notice is not in line with 125 years of binding California law, and the proposed rules should not be enacted at all.

However, should the LWDA enact the proposed rules, at the least the additional proposed modifications laid out above give attorneys and firms some form of notice and opportunity to correct any issues, rather than going directly to punitive measures, as the proposed rules provide for currently.

II. Proposed Modifications to Proposed § 17415 Only Highlight Potential Equal Protection Issues, Due Process Issues, and Overbroad Nature of the Proposed Rule

In my initial comments, submitted on March 23, 2026, I laid out a number of issues with proposed § 17415(c). (See Klein Initial Comments, pp. 1-8, §§ II.a-d. p. 9-10, § II.f-g). The proposed modifications do not alleviate those concerns or issues. Rather, they appear to confirm and highlight the issues.

For example, the modified proposed definition of "high-frequency filer" in proposed § 17415(b)(1)(A) now would specify that "any attorney that has filed 100 or more, or law firm that has filed 200 or more, PAGA notices in the 12-month period preceding" would be labeled a 'high-frequency filer'" and subject to the additional requirements of proposed § 17415(c).

To put the issues succinctly:

1) There remains no due process. Firms are labeled without even having to be suspected of doing anything wrong, and without any opportunity to be heard; and zero opportunity to avoid the "high-frequency filer" labeling and consequences, even if 100% of notices from a firm have been fully compliant. (See also Klein Initial Comments, § II.(c).)

2) As even the LWDA's own evidence, submitted with its Addendum To Initial Statement of Reasons In Support of Proposed Regulatory Action ("Addendum to Initial Statement"), shows that less-frequent filers exhibit far more issues than high-frequency filers, the modified proposed rules simply make clearer issues related to Equal Protection.

The modification to the proposed definition makes clear the proposed rule is in effect an attack on PAGA plaintiff's ability to have mid-sized or larger firms represent them. It is not about the number of PAGA notices filed, nor the merit or compliance of such notices, but whether those notices are filed by mid-sized or larger firms.

Under the modified proposed rule, a solo practitioner can file 99 LWDA notices without being labeled a high-frequency filer, while even the largest law firm can only file 199 before being given such a label. Thus, for example, if twenty individual attorneys were to each file 99 LWDA notices in a 12-month period, for a combined 1,980 LWDA notices, these attorneys would not be labeled high-frequency filers.

Yet if those same twenty attorneys were to work together as one law firm, each attorney would be limited to filing less than one LWDA letter per month, for a total of no more than 8 or 9 LWDA notices per year. Attorneys who work together as a mid-sized or large law firm can be labeled high-frequency filers while filing less than one-tenth of the quantity of notices that attorneys with small firms can file. Thus, these proposed rules improperly seek to label and create additional burdens and potential consequences for mid-sized and larger firms *without* even a single finding of a single non-compliant LWDA notice by the firm.

Indeed, the LWDA's own evidence, submitted with its Addendum to Initial Statement, shows that less-frequent filers exhibit far more issues than higher-frequency filers. The documents provided with the "Addendum to Initial Statement," Appendix G(3) shows a firm that filed 173 complaints to go with 203 notices – thus, this firm that would be labeled a "high-frequency filer" under the proposed rules actually filed complaints more than 85% of the time it filed notices. On the other hand, a firm that filed 43 LWDA notices *only filed 1 complaint*. Another firm that filed just 54 notices filed 0 complaints. Another firm that filed 54 notices only filed 1 complaint. Another firm that filed 76 notices only filed 2 complaints, i.e. only filed complaints for 2.6% of the notices filed.

All of these firms – none of which are on track to file more than 200 LWDA notices per year – failed to file complaints between 97.7-100% of the time.

Why should the firm that filed complaints 85% of the time be subject to a label (i.e. high-frequency filer) and additional requirements just because it filed more than 200 complaints in a year, when there is no reason to conclude it is doing anything wrong; while smaller firm after smaller firm shows vastly more problems in line with the issues raised by the LWDA, such as filing notices but not ever filing complaints – something the LWDA said is indicative of misusing PAGA notices.

To put it plainly, the very evidence the LWDA provides makes clear the issue is not frequency of filing or total number of notices filed, as *ALL* of the most egregious filers, who file notices but not complaints, are less-frequent filers.

Thus, according to the LWDA's own evidence provided, the "high-frequency filer" designation does not help address the issues raised. At the same time, it raises significant issues related to Equal Protection and Due Process.

As discussed in my initial public comments, attempting to limit plaintiffs' access to sizeable firms significantly undermines the ability of employees to stand up to large companies that exploit them in the workplace, and so undermines Equal Protection. (See Klein Initial Comments, § II.(b).)

Thus, as labeling "high-frequency filers" is not supported by the evidence submitted by the LWDA, and such labelling creates issues regarding Equal Protection, the LWDA should not move forward with the proposed rules that would label and create additional requirements for attorneys or firms that file over a certain number of notices.

3) As discussed in my initial public comments, the proposed additional requirements under proposed § 17415(c), such requiring a sworn statement by plaintiffs for "high-frequency filers," would be directly contrary to more than 125 years of California law and policy, which "permits the use of discovery to get information necessary to plead a cause of action . . . ." (*Williams v Superior Court*, 3 Cal.5th 531, 551-552 (2017).

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).)

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. (*Williams*, 3 Cal.5th at 544.)

None of the issues raised by the LWDA, nor laid out in its evidence, directly relate to nor stem from the frequency with which a party files LWDA notices, as discussed in my initial public comments and above. Indeed, the LWDA's own evidence lays out that lesser-filers appear to be the larger issue with regard to filing notices but not complaints.

Thus, the proposed "high-frequency filer" designation does nothing to alleviate the LWDA's concerns; and in fact, bears no direct relation to the issues raised. The additional requirements that plaintiffs provide a certification, pre-discovery, and that firms that file more than 200 notices per year put a significant, bold-type notice on their notices and carry a derogatory label – regardless of if they have filed nothing but perfect notices for fully credible claims – are without basis, and contrary to more than 125 of binding California law and policy.

Accordingly, even the modified proposed rules in § 17415(c) regarding "high-frequency filers" should not be implemented, as they violate Due Process, Equal Protection, 125 years of binding California law, and are contrary to the LWDA's own evidence.

III. Conclusion

For all the reasons stated above, modified proposed rules §§ 17415 should not be implemented, as they violate Due Process, Equal Protection, 125 years of binding California law, and are contrary to the LWDA's own evidence. If some form of § 17415(d) is implemented, it should only be with the above-proposed modifications to §§ 17420(h) and § 17415(d). The parts of § 17415 regarding "high-frequency" filers should not be implemented at all, as no modification can alleviate the significant issues with the proposed rules.

Respectfully,

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