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VIA E-MAIL: Danielle.West@labor.ca.gov

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Re: NOTICE OF PROPOSED RULEMAKING - [PROPOSED] CHAPTER 9. LABOR CODE PRIVATE ATTORNEYS GENERAL ACT OF 2004

MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS

Dear Ms. West:

This correspondence is responsive to the August 3, 2026 Notice of Modifications to Text of Proposed Regulations ("Notice") issued by the California Labor and Workforce Development Agency ("Agency"). The Notice follows after the initial February 6, 2026 Notice of Proposed Rulemaking ("Original Notice") and a first public hearing. The Notice states that "any interested person, or the representative of any interested person, may submit written comments relevant to the modifications to the proposed regulatory text or the documents added to the rulemaking file." On behalf of Moon Law Group, LLP ("MLG"), I write to state our ongoing concerns regarding portions of the currently proposed regulations to be added adopted as Title 8, Division 1, Chapter 9, concerning the Labor Code Private Attorneys General Act of 2004 ("Modified Proposed Regulations") and request further revisions to, or retractions of, those Modified Proposed Regulations. In addition, I will address certain problematic assertions in the Agency's August 3, 2026, Addendum to Initial Statement of Reasons in Support of Proposed Regulatory Action ("First Addendum to Initial Statement").

MLG is a Los Angeles-based law firm focused on advocating for and protecting the rights of employees throughout California. Formed in 2007, MLG has recovered for its employee clients in complex, labor-intensive cases, including wage and hour matters, gender/age/racial discrimination suits, sexual harassment suits, whistleblower suits, and other employment-related single-plaintiff, class-action, and PAGA matters.

MLG previously submitted comments in response to the Original Notice.

A GENERAL COMMENT ON CORE ASPECTS OF THE AGENCY'S STATED REASONS FOR THE PROPOSED RULEMAKING

MGL recognizes that the Agency has undertaken a significant effort in preparing both the first draft of the proposed regulations and the Modified Proposed Regulations. The Modified Proposed Regulations continue to cover a wide array of issues related to PAGA and, in some instances, address issues that are of appropriate concern to the Agency and within its purview. For example, a number of the Proposed Regulations (and Modified Proposed Regulations) apply to the new provisions of PAGA that govern such new topics of concern as cure conferences. Other provisions in the Proposed Regulations (and Modified Proposed Regulations) appropriately make clear what specific mechanism should be used to submit various types of documents to the Agency via its website. As was true with the Initial Statement, the First Addendum to Initial Statement is necessarily voluminous as a result of the topics it addresses. It also undertakes to address concerns that exist, to a degree, in all civil litigation, such as sufficient clarity of allegations. That said, the Modified Proposed Regulations do not appear to have adequately considered significant portions of the voluminous written comments submitted in response to the initial Notice of Proposed Rulemaking. Many of the concerns expressed, including concerns regarding statutory compliance with the Administrative Procedures Act, should have prompted appropriate corrective actions in the Modified Proposed Regulations and the First Addendum to Initial Statement but do not appear to have done so.

One issue that seems to remain of paramount concern in the Modified Proposed Regulations is the volume of annual PAGA notice filings. The First Addendum to Initial Statement attaches, without discussion, a number of additional exhibits related to this issue. Given that the Modified Proposed Regulations are, in some ways, more restrictive than the initial proposed regulations, this issue is clearly one of the primary motivating factors behind many of the Modified Proposed Regulations. For example, while the original proposed regulations defined a "high-frequency filer" as "any attorney or law firm that has filed 200 or more PAGA notices in the 12-month period preceding the filing of the current PAGA notice," the Modified Proposed Regulations now define a "high-frequency filer" as "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 the filing of the current PAGA notice." (Modified Proposed Regulations, at 7.) Thus, following the receipt of public comments expressing concerns about Proposed Regulations, § 17415, the Agency opted to exacerbate the issues with Modified Proposed Regulations, § 17415.

The Initial Statement asserted repeatedly that too many PAGA notices were filed in recent years. Appendix A to the Initial Statement included two lists showing the number of PAGA notices filed during fiscal year 2024-2025 by the 25 law firms and attorneys who filed the most PAGA notices in that period. Moreover, the Initial Statement coupled its discussion of PAGA notice filing volume with a reference to nebulous criticisms of PAGA sometimes being used as a "money-making scheme." The Initial Statement supported that claim by asserting:

> Available data shows that some attorneys or law firms responsible for a high volume of PAGA notice filings do not file or report filing PAGA lawsuits, evidencing an apparent strategy of using PAGA claims as a bargaining chip in seeking a quick individual settlement for the employee alongside a recovery of attorneys' fees.

(Initial Statement, at 6.) As for data to support this contention, the Initial Statement identified firms filing PAGA notices and a smaller number of documented, filed lawsuits based on those PAGA notices. This described situation, however, was incomplete for several reasons, and the First Addendum to Initial Statement does little to improve the quality of the evidentiary record supporting its suppositions about the motivations behind every instance where a PAGA lawsuit is not submitted following the filing of a PAGA notice. First, there is still no comprehensive information explaining why a lawsuit is not reported after a PAGA notice was filed. It could be that no suit was filed, but a client and/or an attorney can decide not to proceed for many reasons. It could also be that one or more of the identified firms is not rigorous in uploading complaints after filing. It could be, as is often true, that, based on existing, earlier filed cases, a later case with a PAGA claim was not ultimately filed. Frequently, Courts stay cases where earlier-filed cases are identified. Sometimes these stays preclude the filing of a PAGA claim while the earlier case proceeds, and then a settlement of the earlier case moots the need to file a PAGA claim at all, and the case is then individually settled because nothing remains but the plaintiff's own claims. While these scenarios were described in MLG's written comments to the Agency, the First Addendum to Initial Statement makes no attempt to evaluate the frequency with which various non-filing scenarios arise.

The First Addendum to Initial Statement also fails utterly to recognize that practices in the legal industry also vary as to how PAGA claims are brought initially. Some firms file a PAGA notice, wait for the exhaustion period to lapse, and then file a complaint containing both direct labor code violations (usually asserted as class action claims) and a PAGA cause of action. Other firms file the PAGA notice and the initial lawsuit at the same time, waiting to add a PAGA as a new cause of action in an amended complaint. These variations in approach generate unexpected outcomes, such as when an employer's counsel contacts a firm and informs them that there are only a few employees or the employer is nearly insolvent, rendering the pursuit of a PAGA claim economically non-viable as a reasonable risk for a private firm. When such an outcome occurs, the choice not to proceed is not to proceed is not indicative of a "money-making scheme;" PAGA does not require counsel to tilt at windmills.

There is yet another reason for a mismatch between PAGA notices and reported PAGA cases. When a case is initiated, a plaintiff often refers co-workers to the firm. Firms that have filed an initial case will sometimes be retained by the later-referred co-workers. When that occurs, firms sometimes amend the initial PAGA notice, but they sometimes file a separate PAGA notice for the new employee, frequently waiting to add the new client as a named plaintiff in the existing lawsuit. PAGA provides no basis for requiring one approach over the other. But what the filing of a separate PAGA notice *does* do is increase the number of filed notices while not increasing the number of reported cases in lockstep. This circumstance was described in MLG's written comments to the Agency, but, again, the First Addendum to Initial Statement makes no attempt to quantify this practice or even acknowledge it.

Overall, the tenor of the First Addendum to Initial Statement, and the Modified Proposed Regulations themselves, adds weight to the initial concern that the Agency views all attorneys or firms filing a larger number of PAGA notices to be engaged in malfeasant conduct of some sort and devised the Proposed Regulations and Modified Proposed Regulations with punitive intent to impede those firms or lawyers and interfere with the attorney-client relationships at those firms. As will be discussed in more detail below, specifically as to Proposed Regulations, § 17415, the original Notice, the Initial Statement, and the First Addendum to Initial Statement contain flawed analyses that, as currently drafted, would present to a neutral viewer as either arbitrary or designed to target larger law firms specifically, in an unconstitutionally discriminatory manner and without even a rational basis grounded in the text of PAGA.

For example, following a discussion of instances where PAGA notices were filed but the filing of lawsuits was not reported to the Agency, the Initial Statement then described sending deficiency notices to some law firms, directing those firms to correct "patent deficiencies" in the PAGA notices that had been filed. The discussion concluded by noting, "Of the total 178 cases subject to directions an amended PAGA notice be filed, amended notices were filed in 134 cases, meaning PAGA claims were abandoned in about 25% of the cases." (Initial Statement, at 7.) The significance of the 25% figure is never explicitly stated. Rather, one is left with the impression that the significance is left unstated to permit the inuendo that only an improper initial filing explains the failure to "cure" each and every PAGA notice. Other reasons, less nefarious, are never discussed, but they would be as speculative as the suggestion that the 25% of uncorrected PAGA Notices could not be cured in any manner.

Similarly, the Initial Statement, in its discussion of trends, said, "Experience has shown a propensity by some attorneys to ***exploit*** the minimal notice requirements described by courts before the 2024 legislative reforms, resulting in conduct detrimental to the proper functioning of the law." (Initial Statement, at 5, emphasis added.) First, compliance with notice requirements *approved* by courts is not "exploitive." It is authorized, legal conduct. Second, the notice requirements in the text of PAGA are unchanged. Thus, the characterization of conduct occurring "before the 2024 legislative reforms" suggests that the LWDA believes, or would have readers of its Initial Statement believe, that the notice requirements (the "pleading standard") governing a PAGA notice are no longer "minimal" or that the courts to consider the issue, *including* the California Supreme Court, are all wrong in their construction of the notice requirements in the text of PAGA. The LWDA, the Agency charged with promoting employment law compliance in California, should know both that adherence with court rulings is not "exploitive," and the "minimal notice requirements" governing PAGA notices did not change with the 2024 amendment to PAGA. Rather, the LWDA is bound by the judicial constructions of PAGA notice requirements and is not authorized to override those judicial decisions with its own preferred constructions of PAGA requirements.

The use of non-neutral language in the Initial Statement and the First Addendum to Initial Statement raises concerns of bias in the creation of the Modified Proposed Regulations. And while one hopes that the Agency is operating under the best of intentions, public trust in regulatory bodies is reduced when even the possibility of bias can be identified in regulatory actions. Moreover, while we prefer to ascribe laudable intentions to the Agency's efforts in this drafting process, the Modified Proposed Regulations issued in response to written comments regarding the initial Proposed Regulations suggests that, at least as to some of the Modified Proposed Regulations, the Agency is overtly attempting to thwart a core purpose of PAGA while discriminating against larger law practices that handle a higher proportion of PAGA cases filed each year. Specifically, it appears that the Agency is intent upon impeding the filing of PAGA cases, at least by the larger employment law-focused law firms in California, in order to depress the total number of such cases filed each year.

Finally, the First Addendum to Initial Statement still makes no mention of an external series of events significantly impacting firms in the wage and hour field, ultimately leading to a marked increase in PAGA lawsuits. A shift in practice began after 2010, when the United States Supreme Court issued *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662 (2010). That seminal decision on the issue of class action arbitrations prompted employers to increase the rate at which arbitration agreements were imposed on employees. Until 2014, there was substantial uncertainty as to how arbitration agreements operated as to PAGA claims. Then, in 2014, the California Supreme Court issued its decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 379 (2014), *overruled in part by Quach v. California Com. Club, Inc.*, 16 Cal. 5th 562 (2024), and *abrogated in part by Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 142 S. Ct. 1906, 213 L. Ed. 2d 179 (2022). This arbitration arc appears to have reached its conclusion when *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 142 S. Ct. 1906, 213 L. Ed. 2d 179 (2022) concluded that, in matters governed by the FAA, PAGA claims could be split between "individual" PAGA claims impacting the plaintiff (which would be sent to arbitration) and "non-individual" PAGA claims impacting all other aggrieved employees (which the United States Supreme Court speculated could not be pursued), and *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023), where the California Supreme Court held that plaintiffs could pursue "non-individual" PAGA claims in Court, regardless of any arbitration agreement. This *Iskanian* decision prompted plaintiff-side firms in the wage and hour employment law practice area to increase their focus on PAGA actions as an alternative to wage and hour class actions that were increasingly precluded by arbitration agreements. Of course, that shift could not happen overnight, and Appendix F to the Initial Statement reflects the statewide-shift towards PAGA actions, with settlement submissions logically acting as a lagging indicator. A substantial increase in settlement submissions is seen in 2017, and it climbs from that year. This is entirely consistent with an increase in PAGA action filings beginning in 2015, in response to *Iskanian*. Wage and hour class action practitioners, whose practice focus was optimized to litigate complex cases asserting violations impacting large groups of employees were forced to shift their focus to PAGA actions to achieve a portion of the same ends. Thus, the subtext to the Initial Statement (continued in the First Addendum to Initial Statement), that wage and hour practitioners are engaged in something nefarious by filing more PAGA notices now than they were prior to *Iskanian*, should, instead, recognize that federal law and the United States Supreme Court are primarily responsible for what the Agency has observed and documented in Appendix F to the Initial Statement. Misplaced blame, and a failure to consider the evolution of the entire wage and hour litigation landscape in response to external forces, calls into question whether (1) the Agency has conducted the necessary due diligence before promulgating the Modified Proposed Regulations, and (2) the Agency's stated reasons for the choices made in drafting the Modified Proposed Regulations are less than fully candid and harbor some unstated bias or animus. The Agency should give significant thought to reevaluating the many speculative statements in its Initial Statement and the First Addendum to Initial Statement and reflectively ask whether it has fully considered events impacting wage and hour litigation practices and has complied with its statutory obligation to consider the least burdensome methods for accomplishing legitimate goals that fall within its sphere of responsibility (without modifying or exceeding the stated text of PAGA).

In short, significant portions of the Notice, the Initial Statement, and the First Addendum to Initial Statement, seem less about simple standardization and clarity and more about substantiating regulatory discrimination focused on a tiny minority of large employment law firms. In order for the public at large to have faith in the even dispensation of justice, regulatory actions should not have the appearance of discriminatory targeting as even a portion of their animus. Thus far, the Agency has failed in that regards, as its response to critiques of its Proposed Regulations has, for the most part, elicited what is colloquially knows as "doubling down" on its punitive bent.

MISSING INFORMATION IS STILL NEEDED TO EVALUATE THE INITIAL STATEMENT AND THE ADDENDUM TO THE INITIAL STATEMENT IN CONTEXT

As discussed above, the Notice and the Initial Statement both explained that the volume of annual PAGA notice filings and their content "impedes the Agency's efforts to distinguish one case from another or to adequately assess the nature, scope, or seriousness of the violations alleged in any given case." (Initial Statement, at 6.) While the Notice and Initial Statement offered data regarding the total number of PAGA notices filed, and data about firms and attorneys filing the largest numbers of PAGA notices, there is no annual data regarding the number of cases selected by the ***Agency*** to investigate after receiving a PAGA notice. Despite attaching almost 600 pages of documents to the First Addendum to Initial Statement, there is still no information provided regarding the number of cases selected by the Agency to investigate each year, from ***both*** before ***and*** after the enactment of PAGA. This information would add context to the claim that trends in the drafting of PAGA notices has impeded the Agency's ability to evaluate cases. If the number of cases taken by the Agency each year has not changed significantly over time, even as the number of PAGA notices has increased significantly, then factors other than trends in the content of PAGA notices are likely at work. One obvious explanation is that budgetary constraints impacting staffing at the Agency are the primary factor limiting the Agency, not the manner in which PAGA notices were drafted in recent years:

> The Legislature enacted PAGA almost two decades ago in response to widespread violations of the Labor Code and significant underenforcement of those laws. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, 95 Cal.Rptr.3d 588, 209 P.3d 923 (*Arias*); Assem. Com. on Labor & Employment, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended July 2, 2003, p. 3 (Assembly Labor Committee Analysis).)

Adolph v. Uber Techs., Inc., 14 Cal. 5th 1104, 1116 (2023). Before implementing regulations that impermissibly and arbitrarily target a small group of larger law firms for disparate treatment, the Agency should provide additional data to permit the public to evaluate whether its enforcement capabilities have changed in obvious ways before and after the passage of PAGA in 2004. Stated another way, if, historically, the Agency never investigated more than, say, 500 employers in a year in penalty actions, the Agency cannot now claim that the filing of 1,000 PAGA Notices in a year is any different than the filing of 5,000 PAGA Notices in year, given that the Agency was not equipped to investigate more than 500 in any particular year. In order to evaluate the Agency's claim that regulations are needed to permit the Agency to review PAGA notices, there must be evidence in the record that the Agency *could* evaluate at least the entire volume of PAGA notices filed in recent years if only they were filed in compliance with the Modified Proposed Regulations. If the Agency cannot substantiate that position with concrete data showing the capacity to evaluate PAGA notices at current filing levels, it seems more likely that the Agency is conceding that it *cannot* review at current filing levels, regardless of the content and formatting of filed PAGA Notices. This would then suggest that the unstated purpose of the Modified Proposed Regulations is to *suppress* PAGA notice filings down to a level that the Agency views as falling within its capacity to review. If this is true, the Agency should recall that the foundational purpose of PAGA was to permit significantly greater Labor Code enforcement via private sector action; regulations that intentionally target larger employment law firms which naturally file the majority of PAGA actions are directly antithetical to that foundational purpose behind the passage of PAGA. Moreover, nothing within PAGA suggests that the legislature has contemplated a ceiling on the number of PAGA notices submitted each year; such an assertion would be absurd in any event, given that the very reason stated by the legislature in enacting PAGA was to address the "significant underenforcement of those [labor] laws." *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104, 1116 (2023).

COMMENTS ON § 17415. HIGH-FREQUENCY AND "NON-COMPLIANT" FILERS; ADDITIONAL NOTICE REQUIREMENTS AND PREFILING SCREENING ORDERS

Modified Proposed Regulations, § 17415, as presently drafted, contains a sufficient number of errors and objectionable material that minor corrective edits remain unlikely to address its shortcomings. As such, section 17415 should be withdrawn. In particular, section 17415 imposes an arbitrary application trigger that targets only large law firms; discriminates between for-profit and non-profit organizations; lacks a rational basis for the threshold that triggers the "high-frequency filer" designation; interferes with the attorney-client relationship, violates due process requirements in that it fails to establish an objective and clearly-defined mechanism for application of the punitive designation of "non-compliant filer;" violates due process requirements in that it fails to establish an objective and clearly-defined mechanism for contesting the punitive designation of "non-compliant filer" that includes a hearing and mechanism for review of the Agency's determination; fails to require the separation of advocacy and adjudicatory function within the LWDA; appears to impose pleading requirements that are inconsistent with the language of PAGA and pleading standards applicable to wage and hour violations generally; and is predicated upon utterly unsupported speculation about motives. Beyond all of those issues, the Initial Statement and the First Addendum to Initial Statement as to section 17415 (and, in fact, the Initial Statement and the First Addendum to Initial Statement as to all of the Proposed Regulations), contains no "description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives."

Non-compliance with Government Code § 11346.2

Government Code § 11346.2 provides, in part, that any proposed action by an agency must provide, as part of its proposed rulemaking action:

> A description of ***reasonable alternatives*** to the regulation and the agency's reasons for rejecting those alternatives. Reasonable alternatives to be considered include, but are not limited to, alternatives that are proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

Gov't Code § 11346.2(b)(4) (emphasis added). The First Addendum to Initial Statement, as it pertains to Proposed Regulations, § 17415, *still* contains no discussion of reasonable alternatives to the imposition of the pejorative classifications of "high-frequency filer" and "non-complaint filer."[1] This failing as to the entire set of Proposed Regulations was noted in MLG's written comments to the Proposed Regulations. The Agency has made no attempt to remediate this shortcoming in the Modified Proposed Regulations, disregarding the mandate of Government Code § 11346.2. As for Section 17415, there is no discussion of how the Modified Proposed Regulations are likely to achieve "full compliance with the authorizing statute" as compared to any reasonable alternative. Rather, by arbitrarily targeting "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 the filing of the current PAGA notice," the Agency has effectively abdicated the effort to find a reasonable alternative that ensures "full compliance," given that the "high frequency" filer provisions in Section 17415 do not apply to all lawyers and firms filing PAGA notices.

"High Frequency" Filers

The "high-frequency filer" provisions of Proposed Regulations, § 17415, suffer from multiple shortcomings. First, as noted above, the First Addendum to Initial Statement contains no discussion of alternatives to the discriminatory "high-frequency filer" designation that applies only to "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 the filing of the current PAGA notice." (Modified Proposed Regulations, at 7.) Taking, for the moment, the Agency's statements within the actual proposed text of Section 17415 at face value that the sole purposes of Section 17415 are to address (1) PAGA notices that are based on "templates asserting frivolous, conclusory, or boilerplate allegations of Labor Code violations," and (2) the Agency's speculation that any

[1] This defect permeates the entire set of Proposed Regulations. There are no discussions about reasonable alternatives and why the Agency has rejected less burdensome alternatives. Thus, the Modified Proposed Regulations cannot be implemented in light of this overarching failure to adhere to the requirements of the APA.

failure to report the filing of a lawsuit constitutes a "strategy of using PAGA notices as a bargaining chip in leveraging individual settlements," it at least appears that arbitrarily escalating to 100/200 filings thresholds to impose non-statutory additional filing requirements on aggrieved employees and their counsel was not drafted following a thorough consideration of alternative methods to improve (1) the Agency's opinion of the quality of written PAGA notices and (2) the compliance rate for reporting PAGA lawsuit filings. The entirety of the Proposed Regulations, § 17415, is thus invalid for the failure to comply with Government Code § 11346.2, as, by the very terms proposed, it does *not* apply to all PAGA notice filers (abdicating the goal of ensuring "full compliance" with PAGA) and no reasonable alternative is even mentioned, let alone weighed against the Modified Proposed Regulations, § 17415.

Second, the "high-frequency filer" provision of Modified Proposed Regulations, § 17415, is invalid because the arbitrary exemption of both legal aid organizations and smaller law firms from the obligations imposed on a "high-frequency filer" cannot be justified on equal protection grounds, *even* under a rational basis review standard.[2] For example, a Court struck down a workplace safety regulation that exempted small employers from its ambit:

> The breadth and magnitude of the exemption is staggering: It immunizes nearly four of five employers from regulation; 25 percent of all employees in California are shorn of all protection against RMIs. The trial court ruled this provision was inconsistent with the Board's statutory mandate to minimize RMI's in the workplace. On this count we agree with the trial court.

Pulaski v. California Occupational Safety & Health Standards Bd., 75 Cal. App. 4th 1315, 1338, (1999), *as modified on denial of reh'g* (Nov. 24, 1999). Here, section 17415 excludes any lawyer filing less than 100 PAGA notices or any firm who filed less than 200 PAGA notices in the 12-month period preceding the most recent filing and excludes non-profit legal aid organizations, regardless of the number of PAGA notices filed:

> a nonprofit legal aid organization that has obtained Section 501(c)(3) tax-exempt status (26 U.S.C. § 501(c)(3)) and is a qualified legal services project or qualified support center, as defined in section of the Business and Professions Code, shall not be subject to the provisions of this regulation regarding high-frequency filers.

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[2] And there is reason to believe that the standard of review applicable to section 17415 would be a heightened standard, since the provisions of section 17415 impair the core, fundamental right of free access to courts because clients cannot freely select the largest and most experienced law firms to handle their wage and hour issues without considering the risks arising from the required client certification and infringe upon freedom of association rights by placing burdens on relationships between clients and their chosen counsel.

(Modified Proposed Regulations, § 17415(b)(1)(B).) These exclusions are improper (setting aside that the "high-frequency filer" provisions are not the least burdensome means by which the Agency can address the two stated purposes of Section 17415). Section 17415 must be consistent with express terms of Labor Code §§ 2699 and 2699.3 (the authority upon which Section 17415 expressly rests). Labor Code § 2699.3 states:

> The aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

Lab. Code § 2699.3(a)(1)(A). This requirement applies to all aggrieved employees, without distinguishing between the nature of the law firm retained to represent them. Treating a law firm that files 199 PAGA notices in a 12-month period differently from a law firm that files 201 PAGA notices in a 12-month period is an arbitrary distinction that cannot withstand even minimal scrutiny.

Moreover, the distinction by filer frequency is irrational. Again, taking at face value the Agency's claim that one of the two purposes of Section 17415 is to address PAGA notices that are based on "templates asserting frivolous, conclusory, or boilerplate allegations of Labor Code violations" because they impose a burden on the Agency, it is clear that Section 17415 is not well focused on achieving that goal. If it is accepted that a PAGA notice "asserting frivolous, conclusory, or boilerplate allegations of Labor Code violations" imposes some measure of burden on the Agency when reviewing the PAGA notice, then an inescapable corollary to that premise is that the quantum of burden imposed by such a PAGA notice filed by a firm that submits one such PAGA notice per year is essentially identical to that caused by such a notice filed by a firm that submits 250 PAGA notices per year. The magnitude of the burden imposed by a particular PAGA notice is not in any way determined by how many *other* PAGA notices that firm filed in the prior 12 months. Thus, there is no reason why an arbitrarily selected filing frequency trigger should impose different filing obligations on different firms. It does not rationally address the stated issue. Instead, it penalizes larger employment law firms for the solitary fact that they are large. The First Addendum to Initial Statement and the Modified Proposed Regulations make no attempt whatsoever to grapple with this reality, but that is exactly why Government Code § 11346.2 exists. It is designed to force an agency issuing a regulation to cause minimal intrusion into the landscape it is regulating, preventing overreach and unnecessary burden. The Agency has thus far failed in that regard. Instead, the solution the Agency appears to have selected for the asserted burden of notices that are based on "templates asserting frivolous, conclusory, or boilerplate allegations of Labor Code violations" is to simply treat lawyers filing more than 100 PAGA notices or firms who filed more than 200 PAGA notices in the 12-month period differently from those who filed even one notice less that these threshold triggers. Based on the mismatch between the stated problem – templates asserting frivolous, conclusory, or boilerplate allegations of Labor Code violations – and the solution – imposing a 12-month frequency trigger – it appears that the Agency is utilizing the asserted harm as a pretext for devising a method to reduce the total number of PAGA notice filings per year. No other explanation for this discriminatory solution readily presents itself, and the Agency's comments in the Initial Statement and the First Addendum to Initial Statement do not suggest any other true intention by the Agency.

Modified Proposed Regulations, § 17415(c)(1)(B), imposes a requirement on claimants who have retained large law firms meeting the "high-frequency filer" threshold to personally certify that the violations alleged "accurately describe the violations I believe I personally suffered." The Initial Statement justifies this requirement by mentioning instances where employees at cure conferences contradicted violations alleged on their behalf. (First Addendum to Initial Statement, at 6.) This requirement is improper because its application depends upon the size of firm selected by the aggrieved employee to represent them, and it imposes on aggrieved employees a vague obligation to certify the accuracy of violations when such a certification depends upon legal conclusions and specialized knowledge regarding wage and hour requirements. This would be tantamount to requiring the filing of a verified complaint whenever a personal injury law firm files more than 200 negligence cases in the past year. Nothing in PAGA supports this requirement and no comparable requirement exists anywhere in California law.

First, for many PAGA claims, whether a violation occurred requires a legal evaluation coupled with specialized knowledge that most employees have no ability to perform. Most employees are unaware of legal rights provided under the Labor Code, having no awareness, for example, of the required timing of meal periods, their required duration, that they cannot be interrupted, that they must be free of all employer control, when a second meal period is required, how a meal period can be waived, or what must occur if a meal period is not provided in accordance with all legal requirements. When testifying at depositions, employees often respond to open-ended questions about issues with work conditions like meal period compliance by providing simplistic answers that sound like there are no problems. For example, a nervous employee can testify that "I got my lunches," failing to explain that they had to have their phone on and respond to work-related calls during their meal period. The testimony, taken at face value, is portrayed by the employer's counsel as a statement that meal periods were provided in a lawful manner. The employee's lack of expertise in wage and hour law is the issue. The certification requirement treats employees like they are attorneys.

Second, Section 17415(c)(1)(B) undermines the policy purpose behind PAGA passage by placing heightened risk on employees (but, selectively, only on those employees who select larger firms with greater resources to represent them). An employer is not required to respond to a PAGA notice and can therefore avoid any certified statement. (Modified Proposed Regulations, § 17421(a).) An employer's cure proposal is a confidential settlement communication. (Modified Proposed Regulations, § 17430(e).) An employer's cure-completion notice requires a sworn statement from a company representative with full access to the employer's policy documents, time records, payroll systems, personnel files, and legal counsel. (Modified Proposed Regulations, § 17435(a).) The employee, by contrast, must personally certify the legal accuracy of complex claims based only on their memory of their work experience, without the legal expertise to evaluate those work experiences in the correct legal context.

Once an employee signs a certification attesting to violations they "personally suffered," the certification becomes a target in discovery and depositions. A plaintiff who cannot explain the mechanics of a regular-rate violation, which virtually no lay employee can, will be characterized as unable to support the very claims they certified. The certification converts the employee's understandable lack of legal expertise into an affirmative though unjustifiable vulnerability. The lack of legal expertise will be transformed into an attack on the plaintiff's credibility. Thus, the Agency's proposed certification requirement undermines enforcement by establishing a system where straw man arguments can be used to attack credibility. Notably, as discussed elsewhere herein, this undermining of aggrieved employees is not neutrally applied; only a handful of larger law firms will have their clients placed at heightened risk of having their lack of legal sophistication used later, in litigation, to undermine their credibility in a PAGA lawsuit. But, because larger firms handle more cases, a non-trivial percentage of aggrieved employees will be exposed to this credibility attack vector.

Finally, a separate proposed Section, Modified Proposed Regulations, § 17420(f), accomplishes the certification goal in an even-handed manner, applicable to all filers. Every PAGA notice will be required to include a section 128.7-style certification by the aggrieved employee or their attorney that the claims have legal and evidentiary support and are not presented for an improper purpose. An attorney is qualified to evaluate whether a regular-rate claim is plausibly supported or whether a wage-statement deficiency can appropriately be alleged as a section 226 violation (importantly, it is also recognized that it is appropriate to assert a claim exists despite current authority to the contrary when a non-frivolous argument exists that prior decisional law is incorrect and should be reconsidered; a layperson has absolutely no ability to evaluate claims asserted in that scenario). Section 17420(f) applies uniformly to all filers. The Agency should not be penalizing only clients of larger employment law firms with a heightened certification requirement. The existence of Section 17420(f) confirms that the Agency has not complied with Government Code § 11346.2 when drafting Modified Proposed Regulations, § 17415.

The "high-frequency filer" requirements should be withdrawn from any final regulations.

Pre-Filing Screening Orders

The Administrative Procedures Act, at Government Code § 11346.5(a)(2) states that the "notice of proposed adoption, amendment, or repeal of a regulation shall include," among other things:

> Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

Gov't Code § 11346.5(a)(2). In the Modified Proposed Regulations, the Agency identifies only Sections 2699 and 2699.3 of the Labor Code as authority for Modified Proposed Regulations, § 17415. Since Labor Code § 2699.3 sets for the statutory basis for administrative exhaustion, a review of the requirements of that section shows that the imposition of a "prefiling screening order" exceeds the requirements imposed under Section 2699.3, which, as noted above, states only that the "aggrieved employee or representative shall give written notice" to the Agency and employer. Lab. Code § 2699.3(a)(1)(A). No provision of PAGA empowers the Agency to change the statutory authorization which permits any aggrieved employee (on their own or through counsel) to "file" a written notice. The statute does not use the word "submit." It, in fact, requires filing of a notice. Nor does PAGA authorize the Agency to decline to permit the filing of a written notice of alleged violations. This is improper under the APA:

> Government Code section 11342.2 provides: "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, *no regulation adopted is valid or effective unless consistent and not in conflict with the statute* and reasonably necessary to effectuate the purpose of the statute." (Italics added.) "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (*Morris v. Williams* (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 433 P.2d 697.)

Pulaski v. California Occupational Safety & Health Standards Bd., 75 Cal. App. 4th 1315, 1341 (1999), *as modified on denial of reh'g* (Nov. 24, 1999). Here, the Agency is attempting to alter the express terms of PAGA by proposing regulatory provisions that would grant the Agency the right to impose a "prefiling screening order" on a "non-compliant" filer. PAGA authorizes the Agency to implement PAGA with *supporting* regulations, not re-write it.

In addition, PAGA specifies time limits for both Agency action and the filing of a PAGA claim in Court after Agency inaction. Proposed Regulations, § 17415, purports to alter those explicit timing provisions, creating uncertainty. For example, Proposed Regulations, § 17415(d)(3)(B), states that "where a person, attorney, or law firm is subject to a prefiling screening order as provided in this subdivision, tolling of the applicable limitations period under subdivision (e) of Labor Code section 2699.3 shall commence upon the submission of a PAGA notice to the Agency for review before its acceptance for filing," but "applicable periods for the investigation of alleged violations or other processes set forth in subdivisions (a), (b), or (c) of Labor Code section 2699.3 shall not commence unless and until a conditionally filed PAGA notice has been screened and accepted for filing by the Agency." This creates ambiguity as to the period covered by the tolling provision, aside from the question of whether the Agency has any authority to alter tolling provisions set forth in the statute.

In addition, Modified Proposed Regulations, § 17415(d)(3)(B), purports to alter the plain language of Labor Code § 2699.3(a)(2)(A), which states: "The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 60 calendar days of the postmark date of the notice ***received*** pursuant to paragraph (1)." The 60-day period to invoke an investigation right commences upon "receipt," not an extra-statutory "acceptance" date. "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967).

The "prefiling screening order" provisions are contrary to the explicit provisions of PAGA authorizing the filing of a written notice of alleged violations and must be withdrawn.

"Non-Compliant" Filers

It is in the terminology used in Section 17415 that the Agency, apparently, thought a non-substantive change in the Modified Proposed Regulations was warranted. Abandoning its use of the charged term "vexatious," the Agency adopted the term "non-compliant" as the new jargon. But the "non-complaint filer" provisions of Proposed Regulations, § 17415, still suffers from multiple, substantive shortcomings. First, as noted above, the First Addendum to Initial Statement contains no discussion of alternatives to the punitive "non-compliant filer" designation.

Second, the "non-compliant filer" provisions violate basic principles of due process. "The liberty interest which the court recognized as a substantive right protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment includes the right of the individual 'to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling [and] ***to pursue any livelihood or avocation***....' " *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 162 (1985). The "non-compliant filer" provisions would directly interfere with an attorney's or a law firm's pursuit of professional endeavors. Thus, the "non-compliant filer" provisions implicate a liberty interest subject to due process protections. It is irrelevant that the impairment would be via Agency action through regulations and not a Court: "The requirements of due process extend to administrative adjudications." *Today's Fresh Start, Inc. v. Los Angeles Cnty. Off. of Educ.*, 57 Cal. 4th 197, 214, 303 P.3d 1140, 1150 (2013). Several due process failings are identified below.

The proposed regulatory language fails to confirm that the advocacy and adjudicatory functions of the Agency are distinctly separated:

> Although procedural fairness does not prohibit the combination of the advocacy and adjudicatory functions within a single administrative agency, tasking the same individual with both roles violates the minimum constitutional standards of due process. The irreconcilable conflict between advocating for the agency on one hand, and being an impartial decisionmaker on the other, presents a " 'particular combination of circumstances creating an unacceptable risk of bias.' "

California DUI Laws. Assn. v. Dep't of Motor Vehicles, 77 Cal. App. 5th 517, 532 (2022). Nothing in the proposed language of Section 17415 specifies who at the Agency will make the initial determination that someone should be notified of an intention to designate them as a "non-compliant filer," and, who at the Agency, subsequent thereto, shall adjudicate the requested designation. Setting aside all other failings, this is improper and must be clarified or removed.

The proposed regulatory language is unconstitutionally vague in that it entirely lacks clear standards that will be used to subject an individual or law firm to a pejorative designation with serious punitive ramifications impacting the conduct of business and freedom of association rights between attorneys and clients. Statutes or ordinances that are not clear as to the regulated conduct are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary and discriminatory enforcement by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "As to the first two applications, the Fourteenth Amendment due process guarantee against vagueness requires that laws provide adequate warning to people of ordinary intelligence of the conduct that is prohibited, and standards to protect against arbitrary and discriminatory enforcement." *Concerned Dog Owners of California v. City of Los Angeles*, 194 Cal. App. 4th 1219, 1231 (2011); *see also*, *Britt v. City of Pomona*, 223 Cal. App. 3d 265, 278 (1990) ("[D]ue process of law is violated by 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' [Citations.]"). Here the "non-compliant filer" provisions of Section 17415 is void under all three applications.

There is no objective measure in Section 17415 as to what constitutes a "non-compliant filer." The definition in the proposed regulation states, in full:

> The term "non-compliant filer" means any person or attorney who has filed three or more PAGA notices within the preceding 12-month period that ***do not comply with applicable requirements***, or where the violations alleged ***appear frivolous or intended to harass***, and the person or attorney has continued to file non-compliant notices after warning by the Agency.

(Modified Proposed Regulations, § 17415(b)(2), emphasis added.) To its credit, the Agency did manage to change "repeatedly" to "three or more," but that, alone, does not render Section 17415(b)(2) clear as to the standards it imposes. Section § 17415(b)(2) is unclear as to what conduct would constitute violations contributing to a finding of being a "non-compliant filer." As seen in the Section, quoted fully above, filing PAGA notices that fail to comply with "applicable requirements" can lead to a finding of being a "non-compliant filer." What is not at all clear from Section § 17415(b)(2) is what, precisely, is the full set of applicable requirements that could precipitate the "non-compliant filer" designation if not followed. Statutes and regulations must be devised so as to "avoid punishing people for behavior that they could not have known was illegal." Section § 17415(b)(2) fails that test. It substitutes one infirmity for another, deleting the language about notices that do not "allege ***adequately*** the facts and theories" and replacing it with language identifying notices that "***do not comply with applicable requirements***."

Thus, Section § 17415(b)(2) is void for vagueness because a core portion of that Section, the statement that the "non-compliant filer" designation can be imposed for failing to comply with "applicable requirements" could be construed to include the obligation to allege the facts and theories in support of an alleged violation. Looking to PAGA itself, the statute requires an aggrieved employee to include in a PAGA notice the "specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." Proposed Section § 17420(d)(2)(B) imposes a similar requirement – the requirement that the "fact and theories" must be alleged in the notice, though, as discussed below, it imposes other, imprecise requirements that render that section defective as well. But Section 17415(b)(2) appears to confer upon the Agency the authority to arbitrarily deem a notice "non-compliant" because the statement of the "facts and theories" is insufficient, in the opinion of the Agency. But the statutory use of the phrase "facts and theories" appears comparable to the requirement that a complaint must include a "statement of the facts constituting the cause of action, in ordinary and concise language." Code Civ. Proc. § 425.10. As interpreted under California law, this means that "the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A. v. William S. Hart Union High School Dist.*, 53 Cal. 4th 861, 872 (2012). Does the Agency still intend to impose what would be a heightened pleading standard for PAGA notices vis-à-vis standard complaints? Or is the standard that will be applied the functional equivalent of a demurrer for uncertainty? If that is the intended standard to be applied here, it should almost never be imposed. Demurrers for uncertainty are almost never sustained when the facts alleged in the complaint are presumptively within the knowledge of the demurring party or ascertainable by invoking discovery procedures. *Chen v. Berenjian*, 33 Cal. App. 5th 811, 822 (2019); *A.J. Fistes Corp. v. GDL Best Contractors, Inc.*, 38 Cal. App. 5th 677, 695 (2019). We presume that the Agency still intends to impose an undisclosed, heightened pleading standard, given that the Initial Statement complains that:

> In the absence of administrative guidance, courts previously have described PAGA's notice requirement as "minimal" (*Ibarra*, *supra*, 102 Cal.App.5th at p. 882) and subject to a low standard of "nonfrivolousness" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545, citing Code Civ. Proc., § 128.7.)

(Initial Statement, at 3.) The Agency has not retracted those statements in the Initial Statement. And the changed text in Section 17415(b)(2) would look no different were the Agency's goal to conceal its intention to impose an undisclosed, heightened pleading standard as a tool for depressing PAGA notice filings by larger annual filers. Were it otherwise, the Agency would not have prefaced that comment with "In the absence of administrative guidance . . . ." This presupposes that the Agency can override the PAGA notice pleading standard described by Courts construing unchanged language in PAGA. It cannot. PAGA states what is required, and the Agency has no power to alter those requirements in the guise of providing "guidance." All that aside, the core problem remains that, under the Proposed Section, an unspecified "applicable" requirements will be imposed, some of which might not be consistent with statutory language of PAGA, might not be consistent with pleading standards generally, and are not disclosed such that readers "of common intelligence must necessarily guess at its meaning and differ as to its application." As stated above, statutes and regulations must be devised so as to "avoid punishing people for behavior that they could not have known was illegal." Section § 17415(b)(2) again fails that test.

Section § 17415(d) also fails to provide adequate procedural due process to anyone charged with an impending "non-compliant filer" designation. All that the Agency provides is a short period of 30 days in which the accused can submit a response that must be supported with a declaration. No hearing is provided. No opportunity to cross-examine the Agency accuser is available. This is the embodiment of the perhaps apocryphal "star chamber" in which the Agency renders a verdict out of sight, applying standards that are undisclosed.

In what is perhaps the most egregious of the many due process and equal protection violations extant in Section 17415 generally, Section 17415(d)(4), while narrow in scope, is profoundly improper. Section 17415(d)(4) states:

> (4) Any person or attorney designated as a non-compliant filer may petition the Agency to remove such designation. A petition to remove a non-compliant filer designation must be filed in accordance with regulation 17410, subdivision (a)(6). No such petition may be filed within six months from the date of the Agency's determination designating the petitioning person or attorney as a non-compliant filer. ***The Agency may prescribe a period longer than six months before a removal petition may be filed based on the nature of the conduct supporting the individual's non-compliant filer designation as set forth in the Agency notice under paragraph (2) of this subdivision***.

(Modified Proposed Regulations, § 17415(d)(4), emphasis added.) That the Agency finds it appropriate to reserve for itself the ability to impose a limitless prescription period before a removal petition can be filed suggests that concerns about the potential for abuse of void statutes and regulations by government actors are well justified. What conduct justifies a longer prescription period? What are the potential lengths of such periods? How is that determined, objectively? This provision is unconstitutionally void for vagueness. That said, the entire framework for "non-compliant filers" is so rife with subjective, undisclosed standards and undefined terms that it must be excised in its entirely from any regulation that is ultimately promulgated.

COMMENTS ON § 17420. WRITTEN NOTICE BY AGGRIEVED EMPLOYEE OR REPRESENTATIVE (PAGA NOTICES)

Proposed Regulations, § 17420, as presently drafted, is void for vagueness because the proposed Section imposes a heightened but imprecise pleading standard that does not align with the simple and clear language of Labor Code § 2699.3. Proposed Regulations, § 17420(d)(2)(B) states:

> 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***. If the claimant is represented by a nonprofit legal aid organization, a qualified legal services project, or a qualified support center that meets the requirements of Labor Code section 2699, subdivision (c)(2), the notice shall specify which violations the claimant personally suffered, as well as the basis upon which the

> claimant alleges any other violations the claimant did not experience but asserts on behalf of other employees

(Modified Proposed Regulations, § 17420(d)(2)(B), emphasis added.) But, looking to PAGA itself, the statute only requires an aggrieved employee to include in a PAGA notice the "specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." The regulation cannot impose a pleading standard not required by the statute. The question, then, is what standard governs? Modified Proposed Section § 17420(d)(2)(B) imposes a new but vague requirement – the statement that the "fact and theories" must be other than "[c]onclusory 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." As noted above, the statutory use of the phrase "facts and theories" appears comparable to the requirement that a complaint must include a "statement of the facts constituting the cause of action, in ordinary and concise language." Code Civ. Proc. § 425.10. As interpreted under California law, this means that "the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A. v. William S. Hart Union High School Dist.*, 53 Cal. 4th at 872. Does the Agency intend to impose what would be a heightened pleading standard for PAGA notices vis-à-vis standard complaints? Or is the Agency claiming the right to exercise the functional equivalent of a demurrer for uncertainty? If that is the intended standard to be applied here, it should almost never be imposed. Demurrers for uncertainty are almost never sustained when the facts alleged in the complaint are presumptively within the knowledge of the demurring party or ascertainable by invoking discovery procedures. *Chen v. Berenjian*, 33 Cal. App. 5th at 822; *A.J. Fistes Corp. v. GDL Best Contractors, Inc*., 38 Cal. App. 5th at 695. As stated above, it appears that the Agency *still* intends to impose an undisclosed, heightened pleading standard, given that the Initial Statement complains that:

> In the absence of administrative guidance, courts previously have described PAGA's notice requirement as "minimal" (*Ibarra*, *supra*, 102 Cal.App.5th at p. 882) and subject to a low standard of "nonfrivolousness" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545, citing Code Civ. Proc., § 128.7.)

(Initial Statement, at 3.) Were it otherwise, the Agency would not have prefaced that comment with "In the absence of administrative guidance." This presupposes that the Agency can override the PAGA notice pleading standard described by Courts construing unchanged language in PAGA. It cannot. PAGA states what is required, and the Agency has no power to alter those requirements in the guise of providing "guidance." As to what alleging the "facts and theories" means in context of sufficient PAGA Notice, the California Supreme Court answered that question:

> Nothing in Labor Code section 2699.3, subdivision (a)(1)(A), indicates the "facts and theories" provided in support of "alleged" violations must satisfy a particular threshold of weightiness, beyond the requirements of nonfrivolousness generally applicable to any civil filing.

Williams, 3 Cal. 5th at 545. Following *Williams*, California Courts have concluded that *Williams* stands for the simple proposition that the allegations sufficient to satisfy the requirements of Section 2699.3 for PAGA Notices do not differ from the minimal pleading standards applicable to ordinary complaints under California law:

> And we see nothing in section 2699.3 suggesting that factual allegations in PAGA notices must exceed those normally found sufficient in complaints.
>
> Nor do we find anything in PAGA as a whole supporting this proposition. To the contrary, taking our cues from Williams, we find that requiring some sort of heightened-pleading standard at the notice stage would "undercut the clear legislative purposes the act was designed to serve." (*Williams*, *supra*, 3 Cal.5th at p. 546, 220 Cal.Rptr.3d 472, 398 P.3d 69.)

Rojas-Cifuentes v. Superior Ct., 58 Cal. App. 5th 1051, 1060 (2020), citing *Williams*.

All that aside, the core problem remains that, under the Modified Proposed Section, it appears from the vagueness of the Modified Proposed Regulations that an unspecified pleading requirement will be imposed that is not consistent with statutory language of PAGA, not consistent with pleading standards generally, and not disclosed such that readers "of common intelligence must necessarily guess at its meaning and differ as to its application."

Under the conventional pleading standard applicable to civil matters, the "facts" to be pleaded are those upon which liability depends, to wit, "the facts constituting the cause of action." These are commonly referred to as "ultimate facts." *Doe v. City of Los Angeles*, 42 Cal. 4th 531, 550 (2007). "Ultimate facts" are those that raise the issues on which the right to recover depends, meaning the essential elements of the cause of action. Only the facts that are material to the cause of action, the facts that make a difference to the outcome of the case, must be alleged *Estes v. Eaton Corp*., 51 Cal. App. 5th 636, 643 n. 2 (2020); *Foster v. Sexton*, 61 Cal. App. 5th 998, 1027 (2021) (discussing distinction between "ultimate facts," "evidentiary facts," and "legal conclusions"); *Thomas v. Regents of Univ. of Calif*., 97 Cal. App. 5th 587, 610-611 (2023). Thus, under this settled pleading standard, a cause of action asserting the failure to provide timely meal periods as required under the Labor Code is sufficiently stated by nothing more than allegations that (1) plaintiff was employed by defendant, (2) plaintiff was non-exempt, (3) plaintiff worked in excess of five hours during shifts, and (4) defendant failed on one or more occasions to provide a meal period to plaintiff before the end of the fifth hour of work. Additional allegations beyond those essential, ultimate facts, would either constitute "evidentiary facts" or "legal conclusions." For example, alleging that on June 5th, a supervisor told plaintiff to finish a project before taking lunch is an "evidentiary fact;" it is not required to state the cause of action. It is of no moment that a defendant may complain of the general nature of these allegations. It is irrelevant to argue that a different pleading standard in civil actions might be desirable for various reasons. The undisputed fact is that PAGA requires a statement of "facts and theories," which is most consistent with the basic civil pleading standard that Court have *already* evaluated, as the Initial Statement concedes. (Initial Statement, at 3.)

Distinguishing between "ultimate facts" (the bare facts upon which liability depends), legal conclusions, and "evidentiary facts" can sometimes be challenging, with one Court saying:

> However, distinguishing " '[u]ltimate facts' " from "evidentiary" facts and " 'legal conclusion[s]' " can be difficult. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 6:124, p. 6-38; see *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 473, 20 Cal.Rptr. 609, 370 P.2d 313 ["distinction between conclusions of law and ultimate facts is not at all clear"].)

Foster, 61 Cal. App. 5th at 1027. Mayhap, the simplest way to distinguish between the necessary allegations (ultimate facts) and unessential or objectionable allegations (legal conclusions and evidentiary facts) is to consider examples. The civil procedure treatise cited in *Foster*, The Rutter Group's California Practice Guide: Civil Procedure Before Trial, provides the following example:

> 1) [6:125] **Example**: A complaint in a personal injury case alleges that: (1) defendant drove his car immediately after having consumed a fifth of vodka; (2) defendant drove while under the influence of alcohol; and (3) defendant drove in violation of California drunk driving law.
>
> Allegation "(1)" is technically objectionable as "evidentiary" matter; "(3)" is a "legal conclusion"; while "(2)" is the ultimate fact.

1 Robert E. Weil et al., *California Practice Guide: Civil Procedure Before Trial*, ¶ 6:125 (June 2025). The critical observation from this example is that a fact upon which liability turns – driving under the influence – is satisfied with nothing more than the minimal allegation of same: "defendant drove while under the influence of alcohol."

A confounding issue arises in the wage and hour context. While it can be comparatively easier to segregate ultimate facts from legal conclusions and evidentiary facts in the common law context, most wage and hour claims are exclusively defined by statutes and regulations. Thus, the "facts" the must be pleaded in the wage and hour context are frequently nothing more than allegations that a statutory or regulatory requirement was not satisfied. In other words, the "ultimate facts" that set forth a sufficient cause of action in the wage and hour are simply a negation of compliance with the statutory or regulatory mandate. Whether credulously meant or otherwise, this frequently results in the criticism that a wage and hour complaint as nothing more than a recitation of statutory provisions.

This criticism of wage and hour complaints – that they often appear to be mere statutory recitations – is the natural result of pleading causes of action predicated upon statutory and/or regulatory violations. All elements of a cause of action must be pled. "The facts that must be included in a complaint or petition to properly allege a cause of action are referred to as the essential elements of the cause of action." *Foster*, 61 Cal. App. 5th at 1018. However, what constitutes the essential elements is "determined by the substantive law that defines the cause of action." *Ibid*. Witkin's treatise on California Procedure discusses the evolution of code pleading in California, identifying an example of the modern approach: "The modern approach is illustrated by *Semole v. Sansoucie* (1972) 28 C.A.3d 714, 104 C.R. 897." 4 B.E. Witkin, Cal. Proc. 6th Plead § 392 (2026). Turning, then, to Witkin's example, *Semole* explains what is required to sufficiently plead a cause of action in the context of a claim that includes an element dependent upon a statutory violation:

> The earlier versions of the complaint charged respondent with negligence and reckless disregard for the safety of others. Since this action is subject to the provisions of Labor Code section 3601, above quoted, they were manifestly insufficient to state a claim, for they failed to allege the 'calculated and conscious willingness to permit injury or death' required by the statute.
>
> In an effort to remedy the indicated deficiency, the second amended complaint, the charging allegations of which are set forth in full in the margin, included an allegation cast in the words of the statute. Citing the rule that allegations of 'wilful misconduct' require that the facts must be stated more fully than in ordinary negligence cases (*Snider v. Whitson*, 184 Cal.App.2d 211, 7 Cal.Rptr. 353), respondent contends that the complaint must be held inadequate.

Semole v. Sansoucie, 28 Cal. App. 3d 714, 718–19 (1972). *Semole* concluded that an allegation of willful misconduct, paraphrasing the statutory language, was sufficient to allege the "calculated and conscious willingness to permit injury or death" that was an element of the claim, which was subject to a provision of the Labor Code. *Semole*, 28 Cal. App. 3d 719–20.

In sum, the California general pleading standard governing ordinary civil complaints, which Courts have subsequently held to be the standard governing PAGA Notices, requires only the pleading of "ultimate facts," which are those base facts essential to establishing all necessary elements of a cause of action. The Agency is not empowered to change the statutory pleading standard to one that it prefers, not even in the guise of "guidance," as it suggests in the Initial Statement. "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." *Morris v. Williams*, 67 Cal. 2d at 748.

COMMENTS ON § 17420.5. AMENDMENTS TO PAGA NOTICES

Modified Proposed Regulations, § 17420.5, has been substantially revised. However, it remains void as an unauthorized impairment of PAGA. Modified Proposed Regulations, § 17420.5(d) states:

> (d)(1) Notwithstanding subdivision (a), a claimant may not amend a PAGA notice to add violations not alleged, or parties not included, 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, unless the amended PAGA notice includes all of the following, in addition to the other requirements of this regulation:
>
> (A) A list clearly setting forth the specific Labor Code sections allegedly violated and identifying any sections not included in any earlier filed PAGA notice;
>
> (B) A statement clearly describing the specific facts supporting the newly alleged violations and the inclusion of any new parties;
>
> (C) A statement clearly describing how the worker-protection purposes of PAGA, and the interests of justice, are further by amendment of the PAGA notice and the proposed settlement; and
>
> (D) For each newly alleged violation:
>
> (i) A statement describing the scope of any investigation or discovery conducted, including any written discovery or depositions conducted or any exchanges of information between the parties; and

> (ii) A statement describing the manner in which claimant personally suffered the violation.
>
> (2) Exhaustion of the review and investigation periods referenced in subdivision (c) of this regulation is required when a claimant files an amended PAGA notice subject to the provisions of this subdivision. The claimant may not amend a complaint in any pending civil action or submit to the court for approval a proposed settlement including any new violations as alleged in an amended PAGA notice until the periods in subdivision (c) have expired.

(Proposed Regulations, § 17420.5(d).) However, Labor Code § 2699 states, in its entirely as to settlements:

> The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.

Lab. Code § 2699(s)(2). All that is required to settle a PAGA claim under the PAGA statute is (1) approval by a Court, and (2) submission of the proposed settlement to the Agency. As an additional condition precedent, administrative exhaustion must occur, meaning that a PAGA notice must have been submitted to the Agency identifying the violations revolved by way of the settlement. Nothing in PAGA limits the ability to reach a proposed settlement that requires amendment of a PAGA notice to include additional violations. Nothing in PAGA imposes different requirements on a PAGA notice or amended PAGA notice submitted after settlement discussions. The parties will still be required to wait for the Agency to evaluate whether it wants to investigate the additional issues raised in the amended PAGA notice. A Court will still be required to approve the settlement. But what the Agency cannot do, by fiat, is require the filing of PAGA notices with enhanced requirements than exceed what is required by statute.

COMMENTS ON § 17450. WRITTEN NOTICE BY AGGRIEVED EMPLOYEE OR REPRESENTATIVE (PAGA NOTICES)

Modified Proposed Regulations, § 17450(c)(2)(B), suffers from the same defect discussed above, as to Section 17420. However, Section 17450(c)(2)(B) compounds those infirmities by requiring the pleading of additional evidentiary material far outside the scope of the statutory language. Labor Code § 2699.3(b) states:

> The aggrieved employee or representative shall give notice by online filing with the Division of Occupational Safety and Health and by certified mail to the employer, with a copy to the Labor and Workforce Development Agency, of the

> specific provisions of Division 5 (commencing with Section 6300) alleged to have been violated, including the facts and theories to support the alleged violation.

However, Section 17450(c)(2)(B), in addition to the vague but heightened pleading requirements in Section 17420, requires as follows:

> A short and plain statement of the facts and theories supporting each violation alleged and personally suffered by the claimant, including the date or dates of the violations and whether the violations alleged are continuing. If the claimant no longer is employed with the employer at the time of filing the PAGA notice, the claimant shall state the basis for any contention a violation has occurred or is continuing during the time after claimant no longer worked with the employer. If the claimant contends a substantially similar violation as the violation personally suffered by the claimant is occurring at another worksite of the employer, the claimant shall state the basis for such contention, including the address or addresses where a violation occurred or is occurring and the date or dates of the violation, including whether the violation is continuing.

(Modified Proposed Regulations, § Section 17450(c)(2)(B).) The imposition of evidentiary pleading is a significant departure from settled pleading standards that were invoked by the Legislature when it required only a statement of "facts and theories" sufficient to state alleged violations. As explained above, that standard is satisfied through the pleading of "ultimate facts." The precise dates when specific events occurred is not required to state complete causes of action. The Agency exceeds its statutory authority by requiring otherwise.

CONCLUDING REMARKS

The California Supreme Court has, on several occasions, described the primary reason for the enactment of PAGA. In one detailed explanation, the Court said:

> The PAGA addressed two problems. First, the bill sponsors observed that "many Labor Code provisions are unenforced because they are punishable only as criminal misdemeanors, with no civil penalty or other sanction attached. Since district attorneys tend to direct their resources to violent crimes and other public priorities, Labor Code violations rarely result in criminal investigations and prosecutions." (Sen. Judiciary Com., Analysis of Sen. Bill No. 796 (Reg.Sess. 2003–2004) as amended Apr. 22, 2003, p. 5.) The solution was to enact civil penalties for Labor Code violations "significant enough to deter violations." (*Ibid.*) For Labor Code violations for which no penalty is provided, the PAGA provides that the penalties are generally $100 for each aggrieved employee per

> pay period for the initial violation and $200 per pay period for each subsequent violation. (§ 2699, subd. (f)(2).)
>
> The second problem was that even when statutes specified civil penalties, there was a shortage of government resources to pursue enforcement. The legislative history discussed this problem at length. Evidence gathered by the Assembly Committee on Labor and Employment indicated that the Department of Industrial Relations (DIR) "was failing to effectively enforce labor law violations. Estimates of the size of California's 'underground economy'—businesses operating outside the state's tax and licensing requirements—ranged from 60 to 140 billion dollars a year, representing a tax loss to the state of three to six billion dollars annually. Further, a U.S. Department of Labor study of the garment industry in Los Angeles, which employs over 100,000 workers, estimated the existence of over 33,000 serious and ongoing wage violations by the city's garment industry employers, but that DIR was issuing fewer than 100 wage citations per year for all industries throughout the state. [¶] Moreover, evidence demonstrates that the resources dedicated to labor law enforcement have not kept pace with the growth of the economy in California." (Assembly Com. on Labor and Employment, Analysis of Sen. Bill No. 796 (Reg.Sess. 2003–2004) as amended July 2, 2003, p. 4.)

Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348, 379 (2014), *overruled in part by Quach v. California Com. Club, Inc.*, 16 Cal. 5th 562 (2024), and *abrogated in part by Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 142 S. Ct. 1906, 213 L. Ed. 2d 179 (2022). The Modified Proposed Regulations, along with the Initial Statement and the First Addendum to Initial Statement supporting them, have lost sight of that core purpose. What is clear from the tenor of the remarks in the Initial Statement is that aggrieved employees can no longer be confident that the Agency has their best interests in mind. If the "DIR was issuing fewer than 100 wage citations per year for all industries throughout the state," there can be no realistic expectation that the Agency has the operational capacity to neutrally evaluate the allegations of many thousands of PAGA notices (filed because the Legislature determined that doing so furthered the policies underlying the Labor Code) and then apply a vague and unspecified set of standards to those many thousands of PAGA notices in an even-handed and objective manner. Instead, the Modified Proposed Regulations, along with the Initial Statement and the First Addendum to Initial Statement, telegraph an intention by the Agency to single out larger firms for disparate treatment, all while imposing requirements in excess of PAGA and disregarding the APA by failing to comply with the requirement of Government Code § 11346.2 to evaluate, identify, and explain why less burdensome solutions were not proposed by the Agency.

Public trust in government is critical, and it is declining at a distressingly precipitous rate. Actions bearing even the superficial hallmarks of targeted retaliation against a few simply accelerate that decline, creating the impression that the Agency is the adversary of the very individuals it is supposed to support. The Modified Proposed Regulations are void in their entirety for failure to comply with the requirement of Government Code § 11346.2. Beyond that, the specific Modified Proposed Regulations discussed herein must either be withdrawn or substantially reformulated to address the many uncorrected, fatal defects in their proposed terms.

Sincerely,

MOON LAW GROUP, PC

H. Scott Leviant

HSL:sp