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Class Claims Dismissed by Court of Appeals for Failing to Comply with California's Private Attorneys General Act Notice Requirements.

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Court Clarifies Circumstances Under Which Employee "Bounty Hunters" May Collect Penalties for Employer's Violation of Labor Code Provisions

By Marlene Muraco

In the first significant case interpreting the notice and exhaustion requirements of the state's Private Attorneys General Act (PAGA), a California Court of Appeal has dismissed class action claims seeking civil penalties for violations of various statutory recordkeeping requirements and minimum wage and overtime payment obligations. Although the plaintiffs' complaint made no mention of the PAGA and did not purport to bring a claim under that Act, the court in *Caliber Bodyworks v. Superior Court*, No. B184120 (Cal. Ct. of Appeal, 2nd Dist. Nov. 23, 2005), dismissed the plaintiffs' claims for penalties relating to Caliber's alleged failure to properly maintain employee records, issue payment on regular paydays and provide appropriate meal periods, holding that those claims seeking only civil penalties could not be collected via a private right of action. In so doing, the court provided some needed guidance on the scope of the PAGA.

Background

California's Labor and Workforce Development Agency (LWDA) is authorized to assess and collect civil penalties against employers that violate certain specified provisions of the California Labor Code. On the theory that the LWDA lacked sufficient resources to fully enforce the Labor Code, the California Legislature enacted the Private Attorneys General Act (PAGA), which took effect on January 1, 2004. The PAGA, which soon became known as the "bounty hunter law," established a civil penalty for every provision of the California Labor Code that did not previously have one and also authorized employees to sue to recover civil penalties on behalf of themselves and other

current or former employees without the need to comply with the formalities of class action procedures.

The new law touched off a spate of frivolous lawsuits and, as a result, the PAGA was amended in August 2004 to somewhat curtail employees' ability to bring costly lawsuits based upon technical labor law violations. In addition, the amendment added section 2699.3 to the Labor Code, which establishes certain procedures that must be followed before an employee can file suit under the PAGA. Specifically, an aggrieved employee is required to give written notice by certified mail to both the LWDA and the employer of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violation. The LWDA has 30 days to decide whether it is going to investigate the claim. If the agency either declines to investigate, or does investigate but fails to issue a citation, the employee is then free to file a representative lawsuit under the PAGA. In some instances, the employee is required to give the employer notice and an opportunity to cure the alleged Labor Code violation prior to filing suit.

The administrative procedures established by Labor Code section 2699.3 apply to actions to recover civil penalties for the alleged violation of any of the dozens of Labor Code provisions specifically identified in Labor Code section 2699.5, including Labor Code sections 201 (wages upon discharge), 203 (statutory penalties for failure to timely pay wages at termination), 226 (duty to provide itemized wage statements), 226.7 (mandated meal and rest periods), 510 (overtime compensation), 1174 (duty to

maintain employment records), 1197 (minimum wage), 1198 (maximum hours of work) and 2802 (indemnification for employee's expenses and losses in discharging duties).

The penalties imposed as a result of a claim brought under the PAGA are distributed between the employee and the LWDA, with 75% going to the agency and just 25% to the employee. Because of this and the requirement that administrative remedies be exhausted before filing suit, plaintiffs have understandably shown a desire to sue for penalties available under the Labor Code provisions identified in Section 2699.5 *without* bringing their claim under the PAGA. The question of whether, and to what extent, this was possible was something of an open question until the issuance of the *Caliber Bodyworks* decision.

The Case

The plaintiffs in *Caliber Bodyworks* were three former employees of Caliber who alleged that the company had violated the Labor Code by failing to pay minimum wages, failing to itemize deductions from their wages, failing to pay overtime, failing to pay earned wages at termination, failing to provide required meal and rest periods, failing to properly pay employees for working split shifts, and failing to maintain required time records. All but one of the plaintiffs' thirteen causes of action sought penalties for the alleged violations and some sought damages in addition to penalties. However, the complaint made no mention of the PAGA and did not claim to be seeking remedies under that Act.

The issue presented to the court of appeal was whether the plaintiffs, who were seeking penalties for violations of Labor Code provisions enumerated in the PAGA, could pursue their claims without first exhausting their administrative remedies. The plaintiffs argued that the PAGA's administrative prerequisites to filing suit did not apply to them because their class action did not seek civil penalties, or include claims or make any allegations at all under the Act. Nothing in the PAGA, they argued, modifies or restricts the right of an employee to remedy wage-and-hour violations of the Labor Code through a class action lawsuit against his or her employer when the employee is not suing under the Act itself. Caliber, in contrast, argued that the

entire complaint had to be dismissed because each of the plaintiffs' causes of action sought penalties for violations of statutes listed in Labor Code section 2699.5.

The court of appeal took a middle ground — holding that an employee is required to exhaust administrative remedies under the PAGA only as to causes of action that: (1) allege a violation of one of the Labor Code provisions listed in Labor Code section 2699.5; and (2) seek recovery of a “civil penalty” which, prior to passage of the PAGA, was previously enforceable only by the state's labor law enforcement agencies. Causes of action that seek statutory penalties provided by the Labor Code for employer wage-and-hour violations that were recoverable directly by employees before the PAGA was enacted are *not* subject to the Act's exhaustion requirement — even where the Labor Code provision the employer allegedly violated is one of the ones listed in Section 2699.5.

Applying this standard, the court ruled that the plaintiffs' claims for violation of Labor Code sections 1174 (failure to properly maintain employee records), 204 (payment of wages on regular paydays) and 512 (provision of meal periods) were all subject to dismissal because each of those Labor Code sections is listed in Section 2699.5 and the only remedy plaintiffs sought for the alleged violations was the imposition of statutory penalties that, prior to the PAGA, were recoverable only by the Labor Commissioner. Thus, the plaintiffs' failure to exhaust their administrative remedies as to those alleged violations was fatal to their claims.

Three of the plaintiffs' causes of action were hybrid claims that sought unpaid wages, statutory penalties and civil penalties — specifically, their claims for violation of Labor Code sections 1197 (payment of less than minimum wage) and 1198 (failure to pay overtime and failure to compensate for all hours worked). Even though Labor Code sections 1197 and 1198 are listed in section 2699.5, that fact did not impinge upon the plaintiffs' ability to either damages or statutory penalties for the alleged violations. The plaintiffs were, however, precluded from pursuing civil penalties for the violations that, prior to enactment of the PAGA, would have been recoverable only by the Labor Commissioner. Thus, the court struck the

plaintiffs' requests for civil penalties on the three hybrid causes of action.

The remainder of the plaintiffs' causes of action sought unpaid wages or statutory penalties or both, but did not include either an express request for civil penalties (*i.e.*, penalties previously payable only to the Labor Commissioner) or citation to any provision of the Labor Code imposing civil penalties. As a result, the court held that those claims did not implicate the PAGA and the plaintiffs were not obligated to comply with the Act's prerequisites to filing suit before pursuing them.

Conclusion

The *Caliber Bodyworks* decision is welcome news in that it holds that employees may not bypass the administrative exhaustion requirements of the PAGA simply by artfully pleading their complaints to avoid reference to the PAGA. However, the decision also makes clear that an employee need not exhaust his or her administrative remedies for every claim against an employer for alleged violations of the numerous Labor Code provisions listed in Labor Code section 2699.5. Damages for Labor Code violations will continue to be available without first having to submit the claim to the LWDA for certain Labor Code provisions, as will claims for statutory penalties. Employees *will*, however, be required to comply with the PAGA's administrative scheme before they can recover civil penalties for an alleged violation of any of the Labor Code provisions listed in section 2699.5 as to which statutory penalties were only recoverable by the Labor Commissioner prior to the PAGA.

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