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California Supreme Court Eliminates Avenue to Avoid Arbitration of Wage and Hour Claims

The California Supreme Court recently held that the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698, *et seq*.) does not authorize a plaintiff/employee to seek unpaid wages as part of the civil penalties available under PAGA. The case was *ZB, N.A. v. Superior Court,* No. S246711 (Sept. 12, 2019). In a parallel universe somewhere – in which California has not seemed to be at odds with the rest of the nation and the United States Supreme Court on the question of whether wage and hour claims can be arbitrated – the opinion probably does not mean much. Indeed, California employees can still seek their unpaid wages under other provisions of the California Labor Code. But in our universe, five years ago, the California Supreme Court held that employers cannot subject PAGA claims to compelled arbitration and, consequently, plaintiff/employees have since (with some success) attempted to squeeze as much of their damages as possible into a PAGA claim.

The *ZB* opinion – in summarizing the procedural history of the lawsuit – describes the confused landscape behind California wage and hour claims that are subject to arbitration agreements. In *ZB,* although the plaintiff claimed unpaid overtime, she did not even bring a claim under the California Code provision requiring employers to pay overtime. Instead, the plaintiff sought both unpaid overtime and PAGA's more arbitrary civil penalties, on behalf of herself and all other employees aggrieved by her employer's practice, exclusively under PAGA. And the plaintiff had a straight-faced argument in favor of doing so; not only have California courts approved the practice, but PAGA itself – as a matter of grammar and in conjunction with other Code provisions – arguably allows civil penalties to include an employee's unpaid wages. PAGA expressly allows a plaintiff to recover civil penalties specified in other Code sections, and Labor Code section 558 allows the Labor Commission to collect civil penalties as follows:

> [F]ifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.[1]

Based upon this statutory language, the *ZB* plaintiff did what many California wage and hour plaintiffs have been doing when their employment-related disputes are bound by arbitration agreements: she filed a putative representative action exclusively under PAGA with the hope that the court would not compel her PAGA claim to be arbitrated, instead certifying a representative action and allowing her to pursue both substantive wage and hour relief and civil penalties on behalf of every employee in her employer's workforce.

Faced with the plaintiff's lawsuit based exclusively on PAGA, the employer asked the trial court to compel arbitration of that portion of the plaintiff's claim seeking exclusively substantive wage and hour relief. The trial court granted the employer's request, but then some: the trial court held that the employer must arbitrate not only plaintiff's claim for unpaid overtime, but also the unpaid overtime claims of all similarly situated employees who the plaintiff could represent in a PAGA representative action. The employer appealed. In reversing the trial court, the California Court of Appeals made things worse yet for the employer: it held that PAGA claims

[1] Again, this provision governs civil penalties the California Labor Commission could recover. In private actions under PAGA, default civil penalties are $100 for an initial violation and $200 for subsequent violations.

could not be arbitrated *at all* and remanded the case to the trial court to be treated as a PAGA representative action.

The employer appealed again, this time to the California Supreme Court. The Supreme Court's opinion reached a third (but final) conclusion: that PAGA's civil penalties did not permit a private plaintiff to recover unpaid wages as a civil penalty, but rather only $100 or $200 per employee per pay period. The Supreme Court's ruling was based predominantly upon two rationales. First, Labor Code section 558 – while allowing the Secretary of Labor to collect unpaid wages – does not provide a cause of action to private employees. Second, regardless, Labor Code section 558's civil penalty is *in addition to,* and does not encompass, the "amount sufficient to recover unpaid wages."

ZB does not impact *what* California employees can recover when their employer commits a wage and hour violation. Employees can still recover both civil penalties (pursuant to PAGA) and unpaid wages (pursuant to other Code sections). Rather, *ZB* clarifies how employees must go about it when bound by arbitration agreements with their employers. Employees can no longer avoid arbitrating their and similarly situated employees' substantive wage and hours claims by attempting to fit them into a non-arbitrable PAGA representative action. Closing this emerging loophole in the enforceability of arbitration agreements obviously benefits California employers who take advantage of pre-dispute arbitration agreements.

If your organization has any questions regarding this decision or if you would like to discuss a review or update to your arbitration agreement, please contact your Kutak Rock attorney, a member of our National Labor and Employment Practice or a member of our National Wage and Hour Defense Group. You may also visit us at www.KutakRock.com.