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California Supreme Court Ruling Paves the Way for More Representative Actions Against Employers

On June 29, 2009, the Supreme Court of California issued a decision in the case of *Arias v. Superior Court* ("Arias") that has broad ranging effects on California employers or companies with operations in that state. In *Arias*, the plaintiff sued his employer for a variety of violations of California's Labor Code, including failure to pay overtime and provide required meal periods and rest breaks. In the suit, the Plaintiff sought damages for himself and on behalf of other current and former employees under California's unfair competition law, Business and Professions Code section 17200, *et seq.* (the "UCL"), and California's Private Attorneys General Act ("PAGA"), often referred to as the "Bounty Hunter" or "Sue Your Boss" law.

PAGA was enacted by the California Legislature to offer financial incentives to private individuals to enforce state labor laws at a time when the state's labor law enforcement agencies lacked sufficient resources to adequately enforce the laws itself. PAGA permits employees to sue and receive civil penalties for Labor Code violations, but requires that employees give 75% of the collected penalties to California's Labor and Workforce Development Agency, while the remaining 25% is distributed among affected employees. PAGA also allows employees to recover attorneys' fees.

While plaintiffs in employment disputes have, for some time, routinely included UCL and PAGA claims in actions against their employers, employers have oftentimes successfully defended against such claims by arguing that plaintiffs may not bring representative actions on behalf of other employees without first meeting the stringent class action requirements set forth in California Code of Civil Procedure section 382. In *Arias*, the Supreme Court upheld the rule that plaintiffs may not bring representative actions under the UCL without first meeting the class action requirements set forth in Section 382. However, in a surprise turn, the Supreme Court held that a single employee may proceed with a PAGA action on behalf of all aggrieved employees, acting as a private attorney general, without the need to comply with class action requirements.

The *Arias* decision will exacerbate an already unfriendly environment for California employers. First, while plaintiffs may not recover unpaid wages through PAGA, they may recover civil penalties in the amount of \$100 per Labor Code violation and \$200 for each subsequent infraction per pay period per each aggrieved employee for a period up to one year. Thus, if plaintiffs are permitted to pursue PAGA claims for a broad class of employees as *Arias* suggests, employers can be subjected to onerous civil penalties. Even more burdensome is the problem created by the *Arias* decision, whereby employees may take advantage of favorable PAGA decisions against their employer and, on the basis of the Labor Code violations adjudicated in earlier PAGA cases, file duplicative and unruly lawsuits seeking wages and other damages. In *Arias*, the Court noted, but ultimately rejected, the employers' argument that their due process rights would be violated in a situation where "... one plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success." In reaching this conclusion, the Court stated that judgments in PAGA actions bind all aggrieved employees, including non-party employees. However, even this reasoning leaves employers in untenable positions. As construed by the Supreme Court, an action under PAGA will allow employees to benefit on two fronts. First, they will not be required to obtain class certification to bring an action on behalf of other employees. Second, if they prevail, a favorable decision will bind the employer as to all aggrieved employees on the PAGA and other labor-related claims which were at issue in the lawsuit. The adverse impact of the *Arias* decision is not limited to future litigation - it affects pending litigation against employers. In many instances, Plaintiffs will seek to amend their complaint to add PAGA claims to salvage uncertifiable representative actions. PAGA claims will also result in higher settlement demands and more complicated resolution agreements.

Employers should audit their California wage/hour and employment practices to ensure compliance with applicable labor laws. PAGA claims can be based on numerous provisions found in the Labor Code, including those that are not widely known. In fact, Plaintiffs' attorneys have recently used certain Labor Code provisions as a mechanism to include violations of wage orders under the PAGA umbrella. Additionally, some common practices may give rise to claims under the PAGA. For example, many employers have meal period waivers, confidentiality, non-compete, arbitration, independent contractor or other agreements with restrictive or other provisions that may be unenforceable. Labor Code section 432.5 prohibits employers from requiring employees to agree in writing to terms or conditions of employment which an employer knows is prohibited by law. An employee could bring a claim under section 432.5 by alleging that the employer knowingly included an unenforceable term in, for example, an arbitration agreement which the employer required all employees to sign, and then style it as a group claim under PAGA. Employers need to review the documents they require employees to execute to ensure they do not contain provisions that are problematic under Labor Code section 432.5. These are only a few of the possible abuses we may see in the near future as a result of the Supreme Court's ruling in *Arias*.

Given the new burdens imposed on employers by the *Arias* decision, it is important for employers to consult with counsel to discuss options to minimize potentially significant exposure to PAGA-related claims.

Ms. Aragon will be speaking on this subject on September 18, 2009. Please feel free to contact Ms. Aragon at rmaragon@Venable.com or 310.229.9976 if you wish to discuss how the *Arias* decision may impact your enterprise or if you would like more details about her upcoming presentation.

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