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6. Contrary to the Conclusion of the California Supreme Court in Iskanian, PAGA is Unconstitutional On Its Face.

85. In *Iskanian*, the California Supreme Court incorrectly labeled a “PAGA representative action . . . a type of *qui tam* action,” and found that a PAGA action could not be waived because the State—and not the named plaintiff—is the real party in interest. The analogy is incorrect. A *qui tam* action differs significantly from a PAGA action.

86. Unlike *qui tam* actions arising under the False Claims Act, the State of California plays almost no role in a PAGA action. Under PAGA, the LWDA has a limited opportunity to investigate or intervene in an aggrieved employee’s claims. In most cases, LWDA has 65 days to determine whether to investigate and, if it does investigate, 120 additional days to complete the investigation and determine whether to issue a citation. On information and belief, LWDA rarely investigates such claims. A March 25, 2016 report from the Legislative Analyst’s Office (“March 2016 Report”) stated:

The LWDA . . . has been able to devote only minimal staff and resources—specifically, one position at DLSE beginning in 2014—to perform a high-level review of PAGA notices and determine which claims to investigate. **In 2014, less than half of PAGA notices were reviewed, and LWDA estimates that less than 1 percent of PAGA notices have been reviewed or investigated since PAGA was implemented.** When a PAGA notice is investigated, LWDA reports that it has difficulty completing the investigation within the timeframes outlined in PAGA. When an investigation is not completed, or not completed on time, the PAGA claim is automatically authorized to proceed.”

See Legislative Analyst’s Office, *The 2016-17 Budget: Labor Code Private Attorneys General Act Resources*, Budget and Policy Post (Mar. 25, 2016), available at <https://lao.ca.gov/publications/report/3403> (last accessed Nov. 27, 2018) (emphasis added).

The March 2016 Report also noted that:

[T]he intent of PAGA is that LWDA have the opportunity to review PAGA notices and at least in some cases conduct its own investigation prior to the PAGA claim

1 proceeding. Given the minimal resources currently devoted to the review and
2 investigation of PAGA notices, we do not believe LWDA is currently able to fulfill
3 the role intended for it in the PAGA legislation.”

4 *Id.*

5 87. In contrast to the lack of State governmental involvement in PAGA actions, the
6 State maintains substantial control in *qui tam* actions. The Attorney General has 60 days in
7 which to intervene and proceed with an action, and may seek numerous extensions of time in
8 which to do so. Cal. Gov’t Code §§ 12652(c)(4)-(5). While the State is investigating a claim,
9 which is first filed under seal, the *qui tam* plaintiff cannot serve the complaint, litigate, or
10 negotiate a settlement. *See* Cal. Gov’t Code § 12652. If the State declines to intervene, it can
11 intervene at a later time and assume substantial control over the litigation. *See* Cal. Gov’t Code
12 §§ 12652(f), (i). Moreover, the standards for filing bringing a claim under the False Claims Act,
13 and the information provided to the State, are materially greater than what is required under
14 PAGA. Until July 2016, PAGA only required that minimal notice be provided to the LWDA.
15 An aggrieved employee was not required to provide a copy of a proposed complaint, settlement
16 agreement, or even report whether the matter has settled. In fact, the March 25, 2016 report
17 from the Legislative Analyst’s Office recommended changes to PAGA to require “more detail
18 in the initial PAGA notice and that a copy of the PAGA complaint and any settlement be
19 provided to LWDA,” and stated that doing so would be “a reasonable extension of LWDA’s
20 oversight of the PAGA process[.]” *Id.*

- 21 a. In contrast, the False Claims Act requires a complaint be filed, under seal, with a
22 copy served on the Attorney General. Furthermore, the *qui tam* Plaintiff is required
23 to furnish to the Attorney General a written disclosure of “substantially all material
24 evidence and information the person possesses.” Cal. Gov’t Code § 12652(c)(3).
- 25 b. Actions arising under the False Claims Act can also only be dismissed with approval
26 from a court **and** the State Attorney General, “taking into account the best interests
27 of the parties involved and the public purpose of the statute.” Cal. Gov’t Code
28 § 12652(c)(1). No claim arising under the False Claim Act may be released by a

1 private person, except as part of a court-approved settlement. *Id.* (emphasis added).

2 88. PAGA contains no comparable judicial oversight. On information and belief,
3 settlements of Labor Code claims enforced under PAGA frequently involve very little or no
4 allocation of PAGA penalties. There is no judicial oversight unless PAGA penalties are
5 allocated. On information and belief, PAGA claims are used to wrestle greater settlements from
6 private claims and produce very little for the State, despite the fact that PAGA requires that the
7 LWDA receive 75 percent of any civil penalties collected. The above referenced March 2016
8 Report stated:

9 [N]ot all settlements include civil penalties. In fact, LWDA reports that in 2014-15
10 it received just under 600 payments for PAGA claims that resulted in civil penalties.
11 This number is low relative to the amount of PAGA notices LWDA receives each
12 year (roughly 10 percent of notices received in 2014), implying that the final
13 disposition of a large portion of PAGA claims, and likely many settlements, do not
14 involve civil penalties.

15 *Id.* The March 2016 Report also states that the amount of PAGA notices filed with the LWDA
16 in 2014 exceeded 6,300 and the amount of PAGA penalties deposited in the Labor and
17 Workforce Development Fund in 2014 was \$8,400,000. *Id.* On information and belief, the issue
18 identified in the 2016 Legislative Analyst's Office report—a large portion of PAGA claims
19 settling without allocating civil penalties—continues to this day.

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