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### **Court Of Appeal Provides A New Weapon For Employers Regarding PAGA Claims—Manageability**

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The California Court of Appeal issued a landmark decision on September 9, 2021, upholding a trial court's striking (dismissing) of a PAGA lawsuit because Plaintiff could not establish that trial of the matter would be "manageable" in court. In *Wesson v. Staples The Office Superstore, LLC* ("*Wesson*"), the appellate court held that trial courts have discretion to strike claims brought under the Private Attorneys General Act under their inherent authority to manage litigation in their court.

The decision, which could have far-reaching implications for defending PAGA claims, is especially welcome for California employers, as PAGA lawsuits seeking civil penalties for violations of the wage and hours laws set forth in the Labor Code have become a veritable tsunami for employers-- arguably PAGA claims have become more widespread and dangerous than standard wage and hour class actions.

Part of the reason that PAGA claims have become so prevalent and costly is that, unlike standard class actions, Plaintiffs need not seek or obtain class certification of the class of PAGA employees, or in other words, establish that the large class of employees have common issues of proof and facts making class treatment feasible for the trial court. This makes PAGA actions less costly and difficult to manage and litigate for plaintiff's attorneys. Now the *Wesson* decision affects that partially, not by requiring class certification, but by upholding a defense of "manageability," essentially requiring a showing by the Plaintiff which is akin to class certification.

#### The Trial Court's Decision

In *Wesson*, Plaintiff claimed that 346 store General Managers (GM's) of Staples should have been classified as non-exempt hourly employees, and therefore should have received overtime and hourly wages. The Plaintiff sought \$36 million in civil penalties on behalf of himself and the 346 general managers of Staples. The lawsuit was brought as both a class action seeking wages and penalties, and a PAGA claim seeking civil penalties. Plaintiff moved to certify the class of managers, but the trial court denied the motion for class certification, finding that the Plaintiff had not established that his claims were susceptible to common proof because

there was too much variation in the way the managers performed their duties, and the amount of non-managerial tasks performed depended upon the size of the store and manager's approach.<sup>1</sup>

After the court denied plaintiff's motion for class certification, Staples moved to strike Wesson's PAGA claim, "invoking the court's inherent authority to manage complex litigation." Staples argued that the claim would be unmanageable at trial and would violate its due process rights, pointing out that the manager position was not standardized, and that there was "great variation in how Staples GM's performed their jobs and the extent to which they performed non-exempt tasks." Staples presented evidence that its stores varied in size, sales volume, staffing levels, labor budgets, store hours, customer traffic levels, products and services offered for sale, and many other variables. Staples concluded that trial of the matter would be an "unmanageable mess" because it would require essentially 346 separate mini trials that would waste the time of the court and the parties.

Plaintiff conceded that a trial of Staple's affirmative defenses with respect to all 346 managers to determine exemption status would take approximately eight years, including 6 trial days per GM, requiring a week-by-week analysis throughout the entire relevant time period. Nevertheless, Plaintiff argued that the PAGA claims was manageable because his prima facie case was manageable, and he need only present evidence that Staples policy and common practice to establish that the GM's did not receive off-duty meal and rest breaks and worked overtime without pay, stemming from the misclassification of its GM's as exempt employees. Although the court invited Plaintiff to present a trial plan to show manageability, including the trial of Staples affirmative defenses that it properly classified its GM's and committed no Labor Code violations, Plaintiff's counsel declined to do so.

As a result, the trial court granted Staples' motion to strike Plaintiff's PAGA claim.

#### The Court of Appeal Decision Affirming the Trial Court

The Court of Appeal affirmed the trial court's decision striking the PAGA claim, concluding that (1) courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable; (2) as a matter of due process, defendants are entitled to a fair opportunity to litigate available affirmative defenses, and a court's manageability assessment should account for them, and (3) given the state of the record and Wesson's lack of cooperation with the trial court's manageability inquiry, the court did not abuse its discretion in striking his PAGA claim as unmanageable.

Plaintiff argued that requiring manageability in PAGA cases would run afoul of prior California Supreme Court decisions holding that class action requirements do not apply to PAGA actions,

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<sup>1</sup> In order to establish its affirmative defense that the GM's were exempt employees, the employer had to establish that each manager met the five-pronged test under the California Wage Order, including that the employee spends the majority of his or her time doing exempt work, meaning managerial tasks and other closely related functions. *Safeway Wage and Hours Cases* (2019) 43 Cal.App.5th 665, 676-678)

and that it essentially would be adding a procedure not contained in the PAGA statute itself. Plaintiff further argued that adding a manageability requirement would essentially obliterate the purpose of the PAGA statute, which is to punish and deter wage and hour violations. The Court of Appeal shot down all of these arguments, setting up what could be a showdown in the California Supreme Court.

### Implications of Wesson

The PAGA statute has no certification requirement, but neither does the California class action statute, Code of Civ. Pro. Section 382. California courts have read into the class action statute a requirement that the Plaintiff must “certify” a class action by showing that common issues of proof allow the trial of multiple plaintiffs together in an efficient manner. Until *Wesson*, no prior California case had held that the same is true for a PAGA case, although as the *Wesson* court noted, various federal district court cases were split on the issue of whether a PAGA claim must meet a manageability standard.

It is unclear what the California Supreme Court might do in the future. But the *Wesson* case, as a court of appeal decision, is *now* binding on California litigants, unless or until the California Supreme Court decides to weigh in on this issue. In the meantime, manageability is a powerful tool for employer defense counsel, and *every* PAGA case should now be analyzed from the perspective of whether it would require countless individualized mini trials and separate proof for each plaintiff, so as to support a manageability defense. This is how class actions have historically been defended, and now PAGA actions will follow the same script.

Indeed, in many cases, as with the issue of class certification, PAGA lawsuits will be lacking in standardized proof as to each Plaintiff, and therefore will support a manageability defense. What form the defense takes also remains to be seen, whether it be a summary judgment motion, a motion to strike as in *Wesson*, or a demand for a trial plan. But like the requirement for class certification, the manageability defense, if it survives the Supreme Court, should be tested when defending most PAGA cases.



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