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The Case for a PAGA Adequacy Requirement

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In *Arias v. Superior Court*, 46 Cal. 4th 969 (2009), the California Supreme Court ruled that Private Attorneys General Act (PAGA) actions need not satisfy class action requirements, and in the fourteen years since, PAGA plaintiffs have routinely (and often successfully) resisted attempts to apply class action principles to PAGA actions. A recent unpublished California Court of Appeal decision bucks that trend by lending support for an implied adequacy requirement for PAGA plaintiffs and counsel.

In *Stone v. Kim*, 2023 WL 8011417 (Cal. Ct. App. Nov. 20, 2023), the California Court of Appeal affirmed the dismissal of a PAGA claim brought by a plaintiff who sought to prosecute the action in pro per. As the Court explained, a PAGA plaintiff represents the interests of the state labor enforcement agency, so by proceeding in pro per, the plaintiff (who was not an attorney) was engaged in the unauthorized practice of law. Therefore, the trial court properly sustained the demurrer. *Id.* at *1

The Court could have stopped there. However, it continued by analogizing PAGA actions to *qui tam* actions brought under the False Claims Act (FCA)—a context it found "instructive." *Id.* at *2. The Court cited *U.S. ex rel. Rockefeller v. Westinghouse Electric Co.*, 274 F. Supp. 2d 10, 16 (D.D.C. 2003) for the point that, "[g]iven the potential" for the plaintiff to bind the government in such actions, "the government must have adequate representation," and therefore, "qualified legal counsel." *Id.*

The court in *Rockefeller* elaborated by analogizing FCA claims to class actions: "Like . . . a class member in a class action suit, a lay relator in a FCA action needs qualified legal counsel to ensure that the real party at interest, the United States, is adequately represented," and "[t]he need for adequate legal representation on behalf of the United States is obviously essential." *Rockefeller*, 274 F. Supp. 2d at 16. *Stone* found this reasoning also "applies to claims under [PAGA]"—and for good reason. *Stone*, 2023 WL 8011417, at *2. Like FCA relators, PAGA plaintiffs "represent and can bind the government, which needs adequate representation." *Id.*

If PAGA implicitly requires that the government be represented by adequate counsel, it may stand to reason that it must also be represented by an adequate plaintiff. Just as the government may be prejudiced by inadequate legal counsel, it may also be prejudiced if its interests are represented by a conflicted plaintiff, or a plaintiff who is unaware of or unwilling to undertake her responsibilities as a party. Because a PAGA plaintiff acts in a law enforcement capacity on behalf of the State of California, other criteria—such as convictions for felonies or crimes of moral turpitude—arguably should also be disqualifying. *See* Cal. Gov. Code § 19572 (setting forth grounds for discipline of state civil service employees, up to and including termination).

While plaintiffs may object to any attempt to impose class action-type requirements in PAGA actions, by allowing a plaintiff to represent absent parties while aggregating together multiple alleged violations, PAGA raises similar challenges for the court system as class actions do. At times, these similar challenges may call for similar solutions, and if the recent oral argument in *Estrada v. Royalty Carpet Mills, Inc.* is any indication, courts may be open to some prudential limits on PAGA actions not expressly spelled out in the statute's text. In this regard, requiring that the State of California be represented by adequate counsel and an adequate plaintiff could be low-hanging fruit.

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