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## *ZB, N.A. v. Superior Court: Scaling Back PAGA-Only Actions.*

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The California Supreme Court recently clarified relief available under the Private Attorneys General Act of 2004 (PAGA). In *ZB, N.A. v. Superior Court*,<sup>1</sup> the court resolved, in the context of a motion to compel arbitration, the open question of whether a PAGA-only plaintiff may recover underpaid wages in a PAGA action under Labor Code section 558. Although section 558 authorizes the Labor Commissioner to recover a civil penalty “in addition to an amount sufficient to recover underpaid wages[,]” the court concluded that the amount of unpaid wages does not constitute a civil penalty that a private citizen has authority to collect through PAGA.<sup>2</sup> Thus, plaintiffs seeking unpaid wages will not be able to avoid applicable arbitration agreements by filing a PAGA-only claim.

### ***The Intersection of PAGA, Section 558, and Arbitration***

Historically, plaintiffs in wage-and-hour matters sought to recover unpaid or underpaid wages through class actions, and they often would concurrently seek to recover civil penalties under PAGA. As courts enforced predispute arbitration agreements containing class action waivers, plaintiffs began bringing PAGA-only claims, since a predispute waiver of the right to bring a PAGA claim for civil penalties on behalf of others was held unenforceable in *Iskanian v. CLS Transportation Los Angeles, LLC*.<sup>3</sup> Plaintiffs still sought to recover unpaid or underpaid wages, however, by seeking to include them as part of the civil penalty provided in section 558, which they could recover through PAGA. Because such unpaid wages were victim-specific, and under section 558 were payable 100% to employees, employers argued that such relief was compensatory in nature and subject to arbitration agreements requiring individual arbitration. Courts of appeal split on whether the unpaid wages portion of section 558 relief was subject to arbitration.<sup>4</sup> The California Supreme Court accepted the ZB case to resolve the split.

### ***Factual and Procedural Background of the ZB Case***

Kalethia Lawson began working as an hourly employee for California Bank & Trust (CB&T), now a division of ZB, N.A., in 2013. Lawson electronically acknowledged receipt of an arbitration agreement, which contained a class action waiver and provided for binding arbitration of “any legal controversy or claim arising out of Lawson’s employment.”

Lawson filed a complaint containing a single cause of action brought under PAGA, alleging that ZB failed to provide overtime and minimum wages, meal and rest periods, timely wage payments, complete and accurate wage statements, complete and accurate payroll records, and reimbursements of business-related expenses. Lawson’s complaint sought “civil penalties against [ZB], including unpaid wages and premium wages per California Labor Code section 558.” Section 558 provides for



\$50 and \$100 for each underpaid employee for each pay period for which the employee was underpaid “in addition to an amount sufficient to recover underpaid wages.”<sup>5</sup>

ZB maintained that Lawson’s arbitration agreement required her to arbitrate all employment claims on an individual basis and moved to compel Lawson to individually arbitrate her claim for victim-specific relief under section 558 and stay the civil action. The trial court generally agreed with ZB, but took a more expansive approach when it ordered the issue to arbitration as a representative action for the unpaid wages of all aggrieved ZB employees. ZB filed an appeal and a petition for writ of mandate.

## ***The California Supreme Court’s Findings***

ZB petitioned the California Supreme Court to resolve the split of authority over whether an employer may compel arbitration of an employee’s PAGA claim requesting unpaid wages under section 558. Before it could resolve that question, however, the court explained that it must “answer a more fundamental question: whether a plaintiff may seek that amount in a PAGA action at all.”<sup>6</sup>

The court examined the history of PAGA, Labor Code civil penalties, and section 558. Before PAGA was enacted, section 558 enabled only the Labor Commissioner to seek civil penalties and unpaid wages against employers. Notably, the court highlighted that the enacting Legislature characterized only the fixed amount in section 558 as the new civil penalty it was creating for the Labor Commissioner’s sole enforcement. After PAGA was enacted, employees could step into the shoes of the Labor Commissioner and seek civil penalties, including the civil penalties in section 558. But the court concluded that PAGA does not authorize employees to collect unpaid wages under section 558.

The court held that the underpaid wages in section 558 are compensatory damages, as opposed to civil penalties. It explained that a reading of unpaid wages as civil penalties available under PAGA would result in 75% of an employee’s wages being directed to the LWDA, which is inconsistent with section 558(a)(3)’s requirement that 100% of recovered wages should be paid directly to affected employees. As further support that underpaid wages in section 558 are not civil penalties, the court illustrated how a “vast majority” of civil penalties in the Labor Code are “fixed, arbitrary amount[s]”<sup>7</sup> such as the \$50 and \$100 penalties in section 558 and the \$100 and \$200 penalties under PAGA, which suggests that the Legislature understood civil penalties to consist primarily of dollar-denominated fines. Such a reading, opined the court, best harmonizes section 558 with the procedural provisions found in Labor Code section 1197.1, which allows the Labor Commissioner to issue a citation that includes both fixed and underpaid wages components.

Given the court’s conclusion that unpaid wages were not recoverable under PAGA, there were no cognizable claims to compel to arbitration. Thus, the court affirmed the court of appeal’s judgment denying ZB’s motion to compel arbitration. However, the court remanded the case to the trial court to determine whether it should strike Lawson’s unpaid wage claim or allow her leave to amend to state a non-PAGA claim for unpaid wages.

## **What’s Next?**

Although the employer’s motion to compel arbitration was denied, the decision is favorable to employers because plaintiffs’ attorneys will not be able to circumvent arbitration agreements that bar class and collective actions by suing for wages in a PAGA-only claim. Employees who seek unpaid wages will need to file an individual claim, class or collective action, or administrative charge before the California Labor Commissioner. Depending on the type of claim asserted, employers with arbitration agreements may be able to seek to compel individual arbitration.



*If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Los Angeles lawyers:*

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<sup>1</sup> 2019 WL 4309684 (Cal. Sept. 12, 2019).

<sup>2</sup> The court's holding disapproved of prior court of appeal decisions that found unpaid wages were encompassed in the "civil penalty" provided in section 558. *See, e.g., Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112 (2012); *Bradstreet v. Wong*, 161 Cal. App. 4th 1440 (2008); *Jones v. Gregory*, 137 Cal. App. 4th 798 (2006); *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365 (2005); *Zakaryan v. The Men's Wearhouse, Inc.*, 33 Cal. App. 5th 659 (Mar. 28, 2019); and *Mejia v. Merchants Building Maintenance, LLC*, 38 Cal. App. 5th 723 (Aug. 13, 2019).

<sup>3</sup> 59 Cal. 4th 348 (2014).

<sup>4</sup> *See, e.g., Esparza v. KS Indus., L.P.*, 13 Cal. App. 5th 1228, 1245–46 (2017) (compelling arbitration); *Zakaryan v. The Men's Wearhouse, Inc.*, 33 Cal. App. 5th 659, 674 (2019) (denying arbitration).

<sup>5</sup> Cal. Lab. Code § 558(a)(1)–(2).

<sup>6</sup> *ZB, N.A. v. Superior Court*, 2019 WL 4309684, at \*1.

<sup>7</sup> *Id.* at \*9.