

Alert | Labor & Employment



September 2019

2 Steps Forward, 1 Step Back: California Supreme Court Nixes Plaintiffs' Ability to Recover Unpaid Wages Under PAGA, but Forecloses Defendants' Path to Arbitration

On Sept. 12, 2019, the California Supreme Court in *ZB, N.A. v. Superior Court of San Diego County (Lawson)* delivered a victory for California employers, clarifying that a plaintiff bringing a Private Attorneys General Act (PAGA) action may not recover as a “civil penalty” the “wages” referenced in Cal. Labor Code section 558, and thereby limited the monetary recovery workers can seek under PAGA.

PAGA allows a plaintiff-employee to seek civil penalties on behalf of the plaintiff and other “aggrieved employees” for a Labor Code violation, if the Labor Commissioner first receives proper notice of the claim and declines to take action on it. Among the Labor Code sections often relied on by plaintiffs in such cases is Labor Code section 558, which enables the Labor Commissioner to collect \$50 and \$100 in civil penalties against employers that unlawfully deny overtime compensation to workers, and allows the Commissioner to recover “an amount sufficient to recover underpaid wages.” Though PAGA provides that amounts recovered by a private litigant are to be distributed 75% to the state and 25% to “aggrieved employees,” section 558 provides that any wage-based recovery under section 558 goes entirely (100%) to the workers.

In *ZB, N.A.*, the Supreme Court definitively held that a plaintiff may not seek the “underpaid wages” component of section 558. Having first noted that section 558 does not create a direct private right of action, the court further held that the “wage” component of a section 558 penalty is not a civil penalty, and therefore cannot be pursued derivatively through PAGA: “Although section 558 authorizes the Labor Commissioner to recover such an amount, this amount – understood in context – is not a civil penalty that a private citizen has authority to collect through the PAGA.” Simply, because the unpaid wages are “damages” rather than penalties, it is not within the scope of PAGA, for which recovery is limited to civil penalties. Employees, of course, still are able to sue directly on substantive underlying Labor Code sections addressing the obligation to pay all wages earned (but not via PAGA or section 558).

Although this is a win for California employers, it does take away a procedural tactic often used by defendants to gain leverage in PAGA actions. Specifically, many defendants had used plaintiffs’ assertions of a section 558 “wage” claim as a means to force that portion of the claim into arbitration, and to stay the balance of the PAGA claim pending resolution of the arbitration. Until yesterday’s Supreme Court’s decision, there was split-authority between the California Courts of Appeal as to whether the “unpaid wage” portion of a PAGA claim could be severed and arbitrated while the remaining PAGA remedies were stayed. The court’s ruling makes the arbitration argument moot, since such unpaid wages are not available to plaintiffs through a PAGA claim at all.

On balance, the decision is a win for defendants, who no longer have to defend against the prior oddity of a PAGA claim – expressly a claim for *civil penalties* – seeking *wages* that could inflate plaintiffs’ monetary recovery. While the court took that claim out of plaintiffs’ quiver, in so doing it also took from defendants any ability to use it to stay the rest of the PAGA claim in favor of an arbitration on the “unpaid wages” claim.

Authors

This GT Alert was prepared by **Mark D. Kemple**, **Ashley M. Farrell Pickett**, and **Michael Wertheim**. Questions about this information can be directed to:

- **Mark D. Kemple** | +1 310.586.7864 | kemplem@gtlaw.com
- **Ashley M. Farrell Pickett** | +1 310.586.7708 | farrellpicketta@gtlaw.com
- **Michael Wertheim** | +1 310.586.7832 | wertheimm@gtlaw.com
- Or your **Greenberg Traurig** attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.† Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.* Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.* Warsaw.- Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer’s legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. †Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig’s Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig’s Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ‡Greenberg Traurig Tokyo Law Offices are operated*

by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2019 Greenberg Traurig, LLP. All rights reserved.