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June 19, 2015

The Honorable Chief Justice and the Honorable Associate Justices
of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Request for Depublication (Cal. Rules of Court, Rule 8.1125(a)(1))
Williams v. Superior Court of Los Angeles
California Court of Appeal, 2nd Appellate District, Div. One
Case No. B259967
Opinion filed: May 15, 2015

Dear Chief Justice and Associate Justices:

Consumer Attorneys of California ("CAOC") respectfully submits this letter in support of the petition for review filed in the above referenced matter.

INTEREST OF CAOC

CAOC is a voluntary non-profit membership organization of over 3,000 consumer and employment attorneys practicing throughout California. The organization was founded in 1962 and many of its members represent employees in wage and hour litigation. CAOC has taken a leading role in advancing and protecting the rights of workers, including submitting amicus briefs in California Supreme Court cases, such as *Brinker Restaurant Corporation v. Superior Court* (2012) Cal.4th 1004 and *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1.

Williams v. Superior Court
Court of Appeal Case No.: B259967
Request for Depublication

Now, CAOC respectfully requests depublication of *Williams v. Superior Court*, (2015) 236 Cal. App. 4th 1151, Case No. B259967 ("*Williams*").

OVERVIEW

On May 15, 2015, the *Williams* decision was certified for publication. *Williams* determined an issue of first impression, defining the scope of discovery in a PAGA action. However, *Williams* completely failed to appreciate the special nature of a PAGA plaintiff's role as a statewide representative of similarly aggrieved employees under the Private Attorney General's Act, *California Labor Code* section 2699, *et seq.* ("PAGA").

PAGA Plaintiffs are proxies for the State Labor Law Enforcement Agencies. PAGA plaintiffs represent all aggrieved current and former employees. *Williams* frustrates the representative capacity of PAGA plaintiffs and undermines the purpose of PAGA to alleviate overburdened state government entities.

PAGA plaintiffs act as proxies for state labor law enforcement agencies. PAGA plaintiffs represent all aggrieved current and former employees to recover civil penalties against their employer.

Williams limits discovery by a plaintiff to his or her own local claims, only potentially permitting statewide discovery if the plaintiff was able to meet some unspecific merits test and only after he or she had been deposed. This restricts a plaintiff from conducting discovery of these statewide employees that are presumed represented by the plaintiff.

Yet, a judgment in a PAGA action brought on behalf of aggrieved employees located statewide will collaterally estop all these employees from asserting their own PAGA claims. These statewide employees will be bound by a judgment in a PAGA action where they were presumed represented - even if discovery was confined to the representative plaintiff's employer location.

It defies logic and reason that a PAGA plaintiff represents all current and former employees yet cannot conduct discovery into whether these same employees are subject to Labor Code violations. It is fundamentally unfair for defendant to be able to collaterally estop employees across the state from bringing a PAGA action if the PAGA action is defeated, but be able to prevent discovery into whether those same employees were subject to Labor Code violations.

Williams mistakenly applies class action principles to PAGA actions. *Williams* applies a class action requirement that the PAGA plaintiff must demonstrate a uniform statewide policy. PAGA claims are not required to meet class certification requirements. There is no class certification procedure in PAGA actions. Requiring a PAGA plaintiff to prove uniformity of statewide policies is a misapplication of the law.

Regardless of whether the matter is a PAGA or class action, *Williams* improperly limits the plaintiff's ability to discover employee contact information. Employee contact information has been held discoverable in wage and hour class actions. *Williams* ignores California precedent in

favor of instituting a new, onerous discovery burden on discovery of employee contact information.

The *Williams* decision is vastly overbroad. The language used in *Williams* will not be strictly limited to PAGA cases, but will be relied upon by employers in all class action cases to deny the production of any pre-certification class-wide discovery. *Williams* confuses controlling law on employee contact information discovery, which will only lead to more discovery battles in court, further clogging the already overwhelmed court dockets.

If *Williams* remains published, it will create a brand new discovery standard heretofore not adopted under California or Federal law. The PAGA and class plaintiff will be required to prove his or her own individual claims on the merits before being permitted to discover the extent to which defendant's conduct extends statewide.

Not only will this decision create an onerous burden on PAGA and class plaintiffs, but it will also directly conflict with the efficient administration of justice. Where only one lawsuit could have been filed on behalf of all aggrieved current and former employees, *Williams* creates the probability that PAGA lawsuits against the same employer will be filed all over California. The plaintiff's representative role is effectively gutted until the plaintiff proves his or her own individual claims first. *Williams* also creates a new requirement in PAGA actions. The plaintiff must now show defendant had uniform statewide policies before engaging in statewide discovery. *Williams* only further burdens court dockets across the state, at a time when judicial economy has never been more important.

DISCUSSION

1. *Williams* Frustrates Representative Capacity Of A PAGA Plaintiff And Undermines The Purpose Of PAGA To Alleviate Overburdened State Government Entities

PAGA was created to address the "shortage of government resources to pursue enforcement" of *Labor Code* violations. *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 379. A PAGA plaintiff is deputized as a private attorney's general to investigate and bring an action for civil penalties on behalf of the state against an employer for violations of the California Labor Code. See *Iskanian, supra,* 59 Cal.4th at 360.

2. PAGA Plaintiffs Are Proxies For The State Labor Law Enforcement Agencies And Represent All Aggrieved Current And Former Employees

Labor Code Section 2699(a) provides that "...any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ("LWDA")...for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself **and other current or former employees**..." (emphasis added). "'An employee suing...under the [PAGA] does so as the **proxy or agent of the state's labor law enforcement agencies**... In a lawsuit brought under the act, the employee plaintiff represents **the same legal right and interest as state labor law enforcement agencies** – namely, recovery of civil penalties that otherwise would have been

assessed and collected by the [LWDA].'" *Iskanian* at 380 (citing *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986) (emphasis added).

Williams holds that, before allowing a PAGA plaintiff to conduct state-wide discovery and fulfill his or her duty to investigate Defendant's state-wide Labor Code violation, plaintiff must first:

1. Prove their "individual claims,"
2. Sit for a deposition,
3. Prove there are "uniform" Labor Code violations at the location where plaintiff works.

By requiring a PAGA plaintiff to jump through these hoops in order to investigate and bring an action for civil penalties on behalf of the state against an employer for violations of the California Labor Code, *Williams* eviscerates the representative power given to PAGA plaintiffs.

PAGA has never required this rule of a plaintiff in his or her representative role and the statute clearly was not designed to limit a PAGA plaintiff in such a manner.

Williams completely dismisses a PAGA plaintiff's special representative nature by claiming that conducting early statewide discovery is "a classic use of discovery tools to **wage litigation rather than facilitate it.**" *Williams, supra,* 236 Cal.App.4th at 1157 (emphasis added). This language demonstrates that the Court completely misunderstood the purpose of a PAGA action. The PAGA plaintiff represents all current and former aggrieved employees, by standing in as a proxy for the state labor law enforcement agencies to recover penalties on behalf of the state for the employer's violations of the *Labor Code*. This is not waging litigation, but enforcing the law on behalf of the state government, which does not have the resources to do the same.

Williams obviously does not view PAGA plaintiffs as deputies or agents of the state's labor law enforcement agencies, as the *Williams* court denies that these plaintiffs have the same "free access to all places of labor" as the Labor Commission, his deputies, and agents. *Williams* at p. 5. The court stated, "...nothing in the PAGA suggests a private plaintiff standing in as a proxy for the DLSE is entitled to the same access." *Williams, supra,* 236 Cal.App.4th 1157.

Putting aside what "free access" means in a PAGA case, *Williams* denies discovery access to the very employees the Labor Code holds that a PAGA plaintiff represents." Labor Code Section 2699(a).

3. PAGA Actions Have A Collateral Estoppel Effect For Aggrieved Employees Represented By PAGA Plaintiffs

Williams held "bare allegations unsupported by any reason to believe a defendant's conduct extends statewide furnishes no good cause for statewide discovery." *Williams, supra,* 236 Cal.App.4th at 1157. However, the "good cause" which *Williams* failed to consider is the collateral estoppel effect for aggrieved employees represented by PAGA plaintiffs.

"Because an aggrieved employee's action under the [PAGA] functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, **including nonparty aggrieved employees**, who would be bound by a judgment in an action brought by the government. [PAGA] authorizes a representative action only for the purpose of seeking statutory penalties for *Labor Code* violations and an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Iskanian, supra,* at 381 (citing *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986) (emphasis added).

The *Williams* court failed to consider the collateral estoppel effect a PAGA action would have on the employees who are presumed represented by a PAGA plaintiff. These employees will be bound by any judgment obtained by the PAGA Defendant and collaterally estopped from bringing their own PAGA actions. It is fundamentally unfair to have these employees be bound by an adverse judgement in a PAGA action when they are being precluded from having the choice to actually participate in the discovery process. *Williams* effectively denies these aggrieved employees the choice to participate in prosecuting the PAGA action, which ultimately effects their legal rights.

It is fundamentally unfair to have employees bound to an adverse PAGA judgement and not providing the PAGA Plaintiff the opportunity to discover whether these same employees were subject to Labor Code violations.

A PAGA case is fundamentally different from a class action case in this regard. In a class action, if the class is not certified, there is no preclusive effect on the putative class members to later bring another class action case. In a class action, there is no preclusive effect unless the case has been certified and the class members are given notice of the case and allowed a chance to participate. Only then will an adverse judgement have the preclusive effect of extinguishing the class member's rights. See *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1083. In other words there is no collateral estoppel effect on the class unless the class is certified and the class members are given notice of the case and the chance to participate.

This is not the case with a PAGA action. With a PAGA action, there does not have to be any notice to the class in order for employees to be bound by an adverse PAGA judgement. Thus, under these circumstances, there is more importance for the PAGA plaintiff to be allowed greater freedom to conduct discovery of all state-wide employees because these employees do not have to be provided any notice of the case in order for the PAGA case to preclude them from recovering PAGA penalties.

Thus, because of the collateral estoppel effect a PAGA action would have on the employees who are presumed represented by a PAGA plaintiff – it is fundamentally fair for these employees to receive a notice advising them of the case and allowing them the opportunity to participate in the discovery and/or proof of Labor Code violations. See *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 562.

4. The *Williams* Decision Mistakenly Applies A Requirement That Plaintiff Must First Prove His "Individual" And Local Claims Before Being Allowed To Conduct Statewide Discovery

Williams held that Plaintiff could not conduct statewide discovery until he first had evidence to prove that he has "provide[d] some support for his own, local claims..." *Williams, supra,* 236 Cal.App.4th at 1158. The *Williams* court states, "His first task will be to establish he himself was subjected to violations of the *Labor Code*." *Williams, supra,* 236 Cal.App.4th at 1158.

The *Williams* court mis-appreciates the nature of a PAGA claim. PAGA claims are not individual claims. A plaintiff does not have "his own" claim as the *Williams* court suggests. Thus, the *Williams* court requirement that plaintiff first "establish he was himself subjected to violations of the *Labor Code*" is a misinterpretation of the law. *Williams, supra,* 236 Cal.App.4th at 1159.

A plaintiff may not and does not bring the PAGA claim as an individual claim, but "as the proxy or agent of the state's labor law enforcement agencies." *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 ("*Arias*"). "The purpose of the PAGA is not to recover damages or restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the *Labor Code*. [Citation.] ... [T]he relief is in large part 'for the benefit of the general public rather than the party bringing the action.'" *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501.

By holding that a Plaintiff must first prove his own claim before being allowed to conduct statewide discovery, the *Williams* court is requiring Plaintiff to first prove a case that he cannot bring.

5. The *Williams* Court Mistakenly Applies A Class Action Requirement That Plaintiff Must Demonstrate A Uniform Statewide Policy.

Williams inappropriately imposes class action requirements in a PAGA action. *Williams* holds that since Plaintiff has not shown that Marshalls has a "uniform statewide policy" it is not reasonable to allow Plaintiff to conduct statewide discovery. *Williams* at 5. "[T]he second task will be to establish Marshall's employment practices are uniform throughout the company, which might be accomplished by reference to a policy manual or perhaps a deposition of a corporate officer." *Williams* at 7.

This is incorrect on several levels. It imposes class action requirements on representative actions brought under the PAGA. One of the requirements of a wage and hour class action in California is a showing of a uniform statewide practice. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1033. However, there is no requirement of showing a uniform statewide practice in a PAGA action. This was specifically rejected by the California Supreme Court in *Arias*. *Arias* at 984.

Uniformity is a requirement that Plaintiff in a wage and hour class action case must be able to demonstrate before class certification. *Duran v. U.S. Bank National Assn.*, (2014) 59 Cal. 4th 1, 37.

Not so with a PAGA claim. There is no certification requirement and/or class certification procedure in a PAGA claim. One must not lose sight of the California Supreme Court holding that class action requirements do not apply to representative actions brought under the PAGA. *Arias* at 984.

A plaintiff in a PAGA case only has to be able to prove by the preponderance of the evidence that there were *Labor Code* violations – not that the *Labor Code* violations were caused by any uniform policy and/or practice. While these *Labor Code* violations could be proved by a uniform policy and/or practice – unlike with wage and hour class actions - there is no requirement that they have to be.

This is not to suggest that plaintiffs in PAGA cases are not required to prove that employees were subject to *Labor Code* violations. The point being is that with PAGA – there is no requirement to show that the *Labor Code* violations were caused by a uniform policy and/or practice before conducting statewide discovery.

6. Regardless Of Whether The Matter Is A PAGA Action Or A Class Action, Employee Contact Information Is Discoverable.

Beyond misunderstanding the purpose of PAGA and the role of a PAGA plaintiff, *Williams* misapplies the law as applied to employee contact information. It is not the type of action that is truly at issue here – it is the information sought.

Employee contact information is discoverable. (See *Pioneer Elecs. (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 373: production of employee contact information "involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life.") There is no distinction between discovery of current and former employees, as requested in a class action or in a representative PAGA action – the same information is requested and the same privacy rights are implicated.

However, the *Williams* ignores established law allowing the discovery of employee contact information. *Williams*, instead, holds employees' right to privacy outweighs plaintiff's need for the contact information. *Williams, supra,* 236 Cal.App.4th at 1158-1159. Essentially, the *Williams* court assumes aggrieved employees will not want to be involved in the PAGA action that may ultimately afford them monetary benefits and penalize the employer for violations of the Labor Code.

In fact, in a PAGA action the plaintiff already represents aggrieved current and former employees as soon after he or she receives authorization from the LWDA to sue for PAGA penalties. *Iskanian* at 379-381; *Cal. Lab. Code* § 2699.3. It logically follows that a PAGA representative should have access to the contact information of percipient witnesses who have knowledge of the employer's unlawful policies and practices, as applied statewide.

However, *Williams* requires plaintiffs to proffer evidence to support that his or her claims extend statewide without allowing the plaintiff access to the discovery that would, in fact, prove the

statewide claims. Specifically, the knowledge of percipient witness–employees employed at employer locations across the state. Essentially, a PAGA plaintiff is told to prove all of his or her state-wide claims before conducting discovery that would allow him or her access to the evidence that would prove all of his or her claims. It is a circular argument that will only provide confusion and necessitate more court intervention in future PAGA actions.

In effect, *Williams* frustrates a PAGA plaintiff's ability to bring representative actions, which further frustrates the purpose behind PAGA – to alleviate the overburdened state government entities and pursue civil penalties on behalf of the state labor law enforcement agencies.

7. The Language Used In *Williams* Is So Overbroad, Encompassing Even Class Action Lawsuits, Such That It Will Be Used To Deny Class Plaintiff's Class-Wide Pre-Certification Discovery

Although *Williams* is a PAGA action, the language used in *Williams* is so broad that it will not be limited to PAGA cases or contact information discovery. Rather, its language will be relied on in class actions to curb *all* pre-certification discovery. *Williams* reasons, "...bare allegations unsupported by any reason to believe a defendant's conduct extends statewide furnishes no good cause for statewide discovery." *Williams, supra,* 236 Cal.App.4th at 1157. With this broad language, putative class plaintiffs can expect a fight for all class-wide discovery they seek, which, prior to *Williams*, did not exist.

Williams also directly conflicts with *Belaire-West Landscape* and its progeny. *Belaire-West Landscape*, specifically addressed employee privacy in pre-certification discovery. In *Belaire-West Landscape*, the court determined employee privacy was considered sufficiently protected by sending out notices to the employees, informing them that the plaintiff sought their personal contact information in relation to a class action lawsuit and that the employees could opt-out of sharing their personal contact information with the plaintiff. *Belaire-West Landscape*, *supra*, 149 Cal.App.4th at 562.

This process has allowed class action lawsuits to proceed with pre-certification class-wide discovery, while protecting the privacy interests of putative class members. The *Williams* court presupposes that employees who may directly benefit from a PAGA action will not want to be involved in a PAGA action that may ultimately be beneficial to them.

To the contrary, *Belaire-West Landscape* states that "employees [may] reasonably be expected to want their information disclosed to a class action plaintiff who may ultimately recover for them unpaid wages that they are owed." See *Belaire-West*, *supra*, 149 Cal.App.4th at 561. The *Belaire-West* court reasoned that putative class members "current and former *Belaire-West* employees [could be] reasonably expected to want their information disclosed to a class action plaintiff who may ultimately recover for their unpaid wages that they are owed." *Id.*

Similarly in PAGA actions, current and former employees could be reasonably expected to want their information disclosed to a plaintiff who may ultimately recover PAGA penalties that would benefit them. If *Williams* is not de-published, these employees will not be afforded the opportunity to become involved with a PAGA action that could ultimately benefit them.

Williams will initiate a standard for obtaining class-wide discovery that is even much more onerous on class plaintiffs than the comparative pre-certification discovery standard in the Ninth Circuit. Before a Plaintiff can obtain class-wide discovery in the Ninth Circuit – particularly in the form of class contact information. See *Mantolete v. Bolger* (9th Cir. 1985) 767 F.2d 1416, 1427 ("a prima facie showing that the class action requirements of [FRCP] 23 can be satisfied **or** that discovery is likely to produce substantiation of the class allegations.").

One can expect Defendants in wage and hour class action cases to use *Williams* to prevent pre-certification class-wide discovery until the class plaintiff can prove his or her case as to his or her individual claims, sit for a deposition, and prove there are "uniform" Labor Code violations at the location where plaintiff works. In other words, Defendants will use *Williams* to circumvent complying with *Bellaire-West* regarding class lists.

CONCLUSION

Williams frustrates the representative capacity of a PAGA plaintiff and completely undermines the purpose of PAGA to alleviate overburdened state labor law enforcement agencies. These plaintiffs are deputized to pursue Labor Code violations in place of the government agencies. *Williams* refuses statewide discovery to PAGA plaintiffs who represent statewide employees, at the detriment of the statewide employees. Statewide employees, whether they were allowed to participate in the PAGA action or not, will be collaterally bound by the judgment obtained in the PAGA action. This defies logic, reason and fundamental fairness.

Williams further displays a misunderstanding of the PAGA by requiring a plaintiff to prove his own claims before potentially being allowed to propound statewide discovery. A PAGA plaintiff does not have "his own" claims because he is a proxy for the state labor law enforcement agency. *Williams* misapplied class action requirements to a PAGA action, requiring plaintiff to prove statewide uniform policies before potentially moving forward with statewide discovery. Ultimately, regardless of whether the action is under PAGA or a class action, statewide employee contact information has been held discoverable.

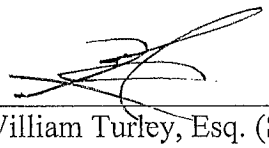
The broad language in *Williams* will result in a conflict with controlling class action pre-certification discovery decisions, which will frustrate wage and hour class action discovery and clog up court dockets.

CAOC recognizes that depublication by this Court is and should be reserved for unusual situations in which publication of an opinion by the Court of Appeal may do harm. As demonstrated above, this is such an opinion.

Dated: June 19, 2015

Respectfully submitted,

THE TURLEY LAW FIRM, APLC



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