



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

MINUTE ORDER

Adriano v. Visby Medical, Inc.
21CV387068
Date of Hearing: 11/29/2023

Hearing Start Time: 1:30 PM
Hearing Type: Motion: Order
Comments:

Heard By: Zayner, Theodore C
Courtroom Reporter: - No Court Reporter

Location: Department 19
Courtroom Clerk: Maggie Castellon
Court Interpreter:
Court Investigator:

Parties Present:

Future Hearings:

Exhibits:

- No appearance. Tentative ruling is not contested.

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 29, 2023 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a representative Private Attorneys General Act (PAGA) action alleging various wage and hour violations against Defendant Visby Medical, Inc. (Defendant). The operative complaint (Complaint), filed September 27, 2021, sets forth a single claim for PAGA penalties for the following alleged Labor Code violations: (1) Sections 510 and 1198 (failure to pay overtime); (2) Sections 1182.12, 1194, 1197, and 1198 (failure to pay minimum wages); (3) Sections 226.7, 512(a), 516, and 1198 (failure to provide and record meal periods); (4) Sections 226.7, 516, and 1198 (failure to authorize and permit rest periods); (5) Sections 226(a), 1174(d), and 1198 (failure to provide and maintain compliant wage statements); (6) Section 204 (failure to pay wages during employment); (7) Sections 201 and 202 (failure to pay wages upon termination); (8) Section 206.5 (unlawful requirement for release of claims as a condition to receiving wages); (9) Section 222.5 (failure to pay costs of medical or physical examinations); (10) Section 2802 (failure to reimburse necessary business expenses); and (11) Section 2810.5(a)(1)(A)-(C) (failure to provide written notice of material terms of employment). (Complaint, 49-115.)

The parties have reached a settlement. Plaintiff Romulo Adriano (Plaintiff) now moves for approval of the settlement. Plaintiff's Motion for Court Approval of the Parties PAGA Settlement (Motion) is unopposed.

II. LEGAL STANDARD FOR APPROVING A PAGA SETTLEMENT

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348, 380, overruled on other grounds by Viking River Cruises, Inc. v. Moriana (2022) __ U.S. __, 2022 U.S. LEXIS 2940.) Seventy-five percent of any penalties recovered go to the Labor and Workforce Development Agency (LWDA), leaving the remaining 25 percent for the employees. (Ibid.) PAGA is intended to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency. (Id. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (Id. at p. 381.)

Labor Code section 2699, subdivision (l)(2) provides that [t]he superior court shall review and approve any settlement of any civil action filed pursuant to PAGA. Court review ensur[es] that any negotiated resolution is fair to those affected. [Citation.] (Williams v. Superior Court (2017) 3 Cal.5th 531, 549.) [C]lass



SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA CLARA

MINUTE ORDER

certification is not required in this context as in a class action. (Haralson v. U.S. Aviation Servs. Corp. (N.D. Cal. 2019) 383 F.Supp.3d 959, 971 (Haralson); Arias v. Superior Court (2009) 46 Cal.4th 969, 975.)

Similar to its review of class action settlements, the court must determine independently whether a PAGA settlement is fair and reasonable to protect the interests of the public and the LWDA in the enforcement of state labor laws[.] (Moniz v. Adecco USA, Inc. (2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws. [Citations.] (Id. at p. 77; see also Haralson, supra, 383 F.Supp.3d at p. 971 [W]hen a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public[.]), quoting LWDA guidance discussed in O Connor v. Uber Technologies, Inc. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1133 (O Connor).

The settlement must be reasonable in light of the potential verdict value. (See O Connor, supra, 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See Vical v. Mistras Group, Inc. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8-9.)

III. PLAINTIFFS' INVESTIGATION, SETTLEMENT PROCESS, AND THE PARTIES' AGREEMENT

After receiving informal discovery from Defendant, Plaintiff's counsel conducted an investigation and evaluation of Plaintiff's PAGA claim. On April 19, 2023, the parties participated in mediation with Louis Marlin, Esq. and were able to eventually negotiate a complete settlement.

Pursuant to the Settlement Agreement, Defendants will pay a gross settlement amount of \$725,000. (Settlement Agreement, 12.) \$241,667 in attorney's fees, litigation costs not to exceed \$25,000, and \$7,000 in estimated administrative costs. (Settlement Agreement, 14, 21.) A proposed total enhancement award of \$5,000 to named plaintiff will be deducted. (Settlement Agreement, 15.) Named plaintiff also agreed to a broader general release of all claims against Defendant and will receive a general release payment of \$5,000 to be paid separately and not from the gross settlement amount. (Settlement Agreement, 16.)

The net settlement of approximately \$446,333 will then be distributed 75 percent (\$334,749.75) to the Labor and Workforce Development Agency (LWDA) and 25 percent (\$111,583.25) to the aggrieved employees. (Settlement Agreement, 13; Motion at p. 11.) By the court's calculation, the approximately 600 aggrieved employees will receive an average payment of about \$185.97. The aggrieved employees are defined as all persons who were employed by Defendant in the State of California as non-exempt employees at any time from July 23, 2020 through April 19, 2023. (Settlement Agreement, 2.)

In exchange for the settlement, aggrieved employees will release all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations, and/or other provisions of law alleged to have been violated in the Action or reasonably could have been alleged in the Action arising out of the alleged facts and/or matters alleged in the Action with respect to Aggrieved Employees during the Settlement Period. (Settlement Agreement, 10.) This release contained in the Settlement Agreement is appropriately tailored to the allegations at issue, and does not release any claims other than those for PAGA penalties.

IV. DISCUSSION

A. Potential Verdict Value

Based on the data produced, Plaintiff estimates that there were between 450 to 29,100 pay periods in the PAGA period (depending on the alleged violation), resulting in maximum potential PAGA penalties of \$20,595,000. (Motion at pp. 14-15.)

By the court's calculation, the settlement represents about 3.5 percent of the maximum value of the case. Considering the risks of further litigation, along with the discretionary and uncertain nature of PAGA penalty



SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA CLARA

MINUTE ORDER

awards in general and the nature of the violations at issue here, the court agrees that the settlement is fair to those affected and is genuine, meaningful, and reasonable in light of the statute's purposes.

B. Attorney's Fees

While the PAGA statute does not expressly require judicial review of claimed attorney's fees, the court believes it cannot adequately fulfill its statutory duty to review the penalties associated with PAGA settlements without also considering attorney's fees. The court thus finds that it must scrutinize the attorney's fees arrangement associated with a PAGA settlement. This is consistent with the observation of many courts that PAGA claims are analogous to *qui tam* suits like those under the federal False Claims Act: when reviewing settlements of *qui tam* claims, courts should and do consider any associated attorney's fees arrangement. (See *United States v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 [attorney's fees award must be considered by the trial court as part of its review of the entire settlement arrangement].)

Here, counsel request a fee award of \$241,667, or one-third of the gross settlement. This percentage is typical for wage and hour cases. Considering counsel's lodestar of \$99,905 based on 133.7 hours of work, resulting in a multiplier of 2.42, the court finds the requested fees to be within the general range of reasonableness. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13]; see also *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 & pp. 1052-1054, Appx. [reviewing fees approved in 24 common fund cases and finding that 20 of these cases had multipliers in the 1.5 to 3.0 range].)

C. Other Costs and Expenses

Counsel's requested litigation costs and expenses of \$25,000 appears reasonable and is approved. The \$7,000 allocated to administrative costs is also approved provided that this represents a hard cap on administrative costs.

Finally, named plaintiff requests an enhancement award of \$5,000. The rationale for such awards in class actions is that named plaintiffs should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class, considering 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. (Cellphone Termination Fee Cases (2010) 186 Cal.App.4th 1380, 1394-1395, internal citations and quotations omitted.) These considerations apply equally in the PAGA context. To support his request for an enhancement award, named plaintiff provides a declaration describing his efforts on the case. Named plaintiff participated in multiple conferences with counsel about the factual bases for the claims, discussed the facts of the case with counsel, closely reviewed the complaint, maintained regular contact with counsel during the litigation, prepared and was available for mediation, and reviewed and evaluated the proposed settlement with counsel. Named plaintiff was willing to represent the LWDA as a deputized attorney general and estimates he spent approximately 25 to 35 hours assisting counsel in this case. Applying the relevant factors, the court finds that an enhancement award of \$5,000 for named plaintiff is appropriate here. (See *Roes v. SFBSC Mgmt., LLC* (9th Cir. 2019) 944 F.3d 1035, 1057 [Reasonable incentive awards are appropriate to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general. [Citations.]].)

V. ADMINISTRATION PROCESS

The settlement will be funded in two equal payments. The first half of the gross settlement amount will be deposited, within 30 calendar days after the entry of the order and judgment, into a Qualified Settlement Fund to be established by the Settlement Administrator. The remaining half will be funded on or before January 31, 2024, or within twenty (20) business days after entry of the Order and Judgment if, as of January



SUPERIOR COURT OF CALIFORNIA COUNTY OF SANTA CLARA

MINUTE ORDER

31, 2024, no entry of the Order and Judgment has yet been issued. (Settlement Agreement, 24.) Within 30 calendar days after the entry of the order and judgment, Defendant will provide the settlement administrator with data concerning the aggrieved employees. (Settlement Agreement, 23.) Within 14 calendar days of the full funding of the settlement, the Settlement Administrator will issue payments to aggrieved employees, the LWDA, named plaintiff, Plaintiff's counsel, and itself. (Settlement Agreement, 24.)

Prior to mailing payments to aggrieved employees along with an explanatory letter, the Settlement Administrator will perform a search based on the National Change of Address database to update and correct for known or identifiable address changes. (Settlement Agreement, 25.) Any checks returned as non-deliverable on or before the check cashing deadline will be promptly sent via first class mail to the forwarding address provided, and if no forwarding address is provided, the Settlement Administrator will perform a skip trace or other search and perform a single re-mailing. Checks will remain negotiable for 180 days and funds associated with settlement checks remaining uncashed after that point will be sent to Worksafe as a cy pres recipient in accordance with Code of Civil Procedure section 384. (Settlement Agreement, 25.)

VI. ORDER AND JUDGMENT

The court GRANTS the Motion for Court Approval of the Parties' PAGA Settlement.

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's Motion for Court Approval of the Parties' PAGA Settlement is GRANTED. The aggrieved employees are: all persons who were employed by Defendant [Visby Medical, Inc.] in the State of California as non-exempt employees at any time from July 23, 2020 through April 19, 2023.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., 668.5.) Plaintiff shall take from his complaint only the relief set forth in the parties' settlement agreement and this order and judgment. The court retains jurisdiction over the parties to enforce the terms of the PAGA settlement agreement and the final order and judgment.

The Court sets a compliance hearing for October 2, 2024 at 2:30 P.M. in Department 19. At least ten court days before the hearing, Plaintiff's counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to Worksafe; the status of any unresolved issues; and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

MINUTE ORDER