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Emerging Trends in PAGA Litigation

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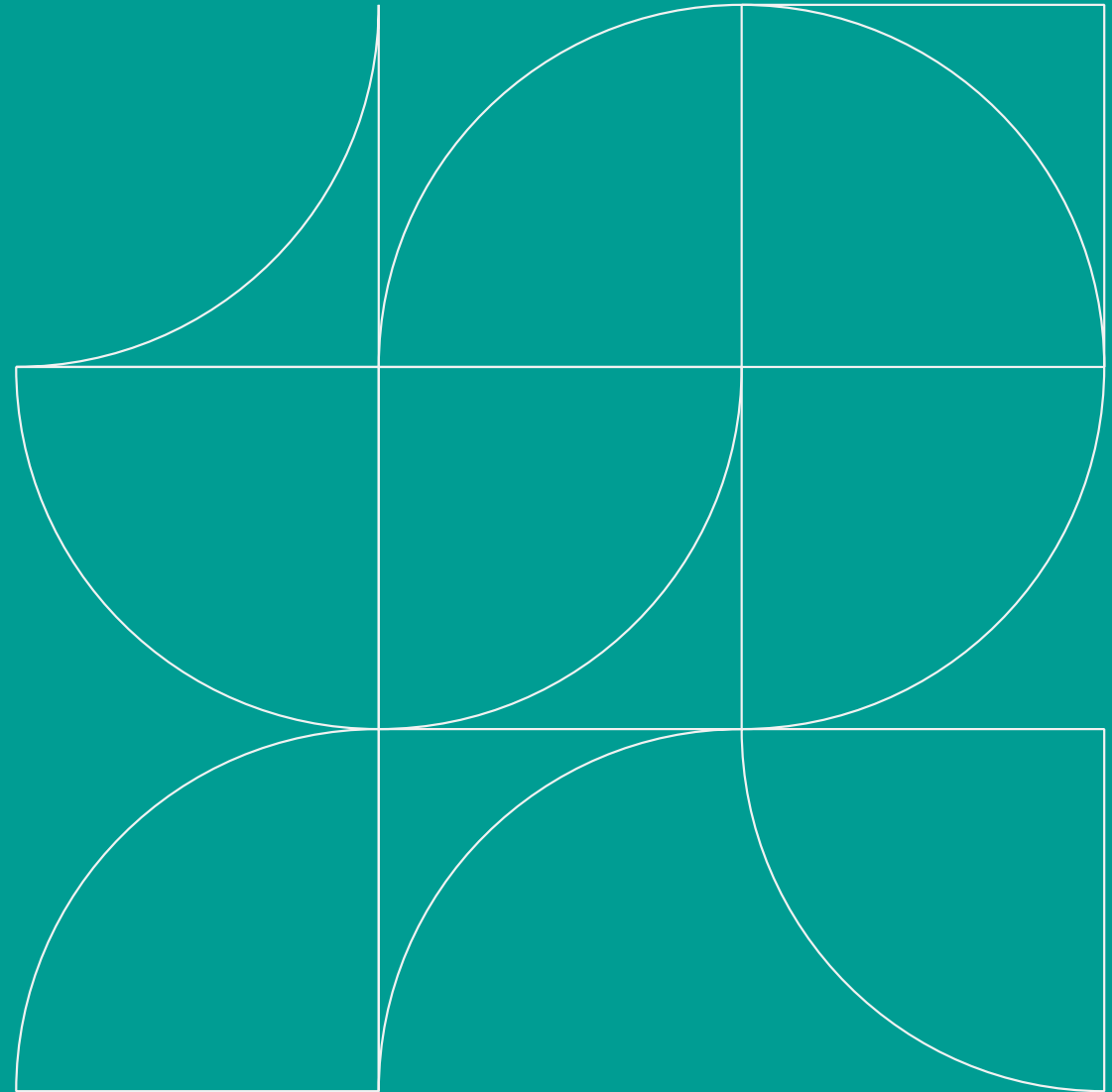
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Today's Agenda

- 01** Manageability – How Best to Employ This Key Defense
- 02** Best Practice Tips For Responding to Plaintiffs Splitting Class and PAGA Claims
- 03** Addressing Overlapping and Follow-On PAGA Claims
- 04** Key Recent PAGA Developments
- 05** Q&A

Manageability – How To Best Utilize This Key Defense



Manageability – What Is It?

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- **PAGA Claims Not Subject to Class Certification Requirements**

- Thus, no “gatekeeper” function or class certification “checkpoint” to ensure that representative PAGA claims may properly be adjudicated based on common evidence.
- ***Real World Consequence***: Employers defending PAGA claims subject to massive discovery costs earlier in cases, before any determination that the predicate Labor Code claims may be tried fairly and efficiently.
- Manageability stems from defendants’ due process right to litigate individual defenses, and means assessing whether plaintiffs can prove *liability* on the underlying Labor Code claims by common evidence in a way that comports with those due process rights.
- *Duran v. U.S. Bank (2014)* and *Williams v. Superior Court (2017)* both talk about defendants’ due process rights and manageability and illustrate this concept.

Wesson Breathes New Life Into Manageability Defense

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- **No “Manageability” Requirement in the PAGA Statute**

- State trial courts had been reluctant to limit or preclude PAGA claims based on manageability concerns – ongoing arguments with the plaintiffs’ bar and no appellate court guidance.

- **The Court of Appeal Tries to Clarify**

- *Wesson v. Staples The Office Superstore* (2021).
- Court for first time unequivocally held “courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable.”
- “As a matter of due process, defendants are entitled to fair opportunity to litigate affirmative defenses” and thus courts should “ensure that both the claims *and defenses* can be manageably tried.”

- **While Not a Panacea, Wesson Was a Welcome Lifeline to Employers**

- *Wesson* urged caution on striking PAGA claims as unmanageable, and also had specific facts weighing for the employer/defendant – BUT, also provided helpful clues/roadmap for employers.

Nothing Good (For CA Employers) Lasts For Long...

Although *Wesson* Remains Good Law For Now, Uncertainty Looms on the Manageability Front....

Recent Events and Current State of Play

- **March 23, 2022:** *Estrada v. Royalty Carpet Mills, Inc.* – Court of Appeal expressly disapproves of *Wesson*, holding “a court cannot strike a PAGA claim based on manageability.” Creates split of authority.
 - *Wesson* is thoughtful and nuanced – *Estrada* is a pro-plaintiff sledgehammer.
- **June 22, 2022:** The California Supreme Court grants review in *Estrada* to resolve the split – what will it do....and when??
- **June 30, 2022:** *Hamilton, et al. v. Wal-Mart Stores, Inc.* – 9th Circuit holds that federal courts lack inherent authority to dismiss PAGA claims on manageability grounds.
 - *Hamilton* falls in line with *Estrada* – *but likely has limited impact.*
- **Now we wait...**

How (And When)

Do I Best Leverage Manageability Arguments Now?

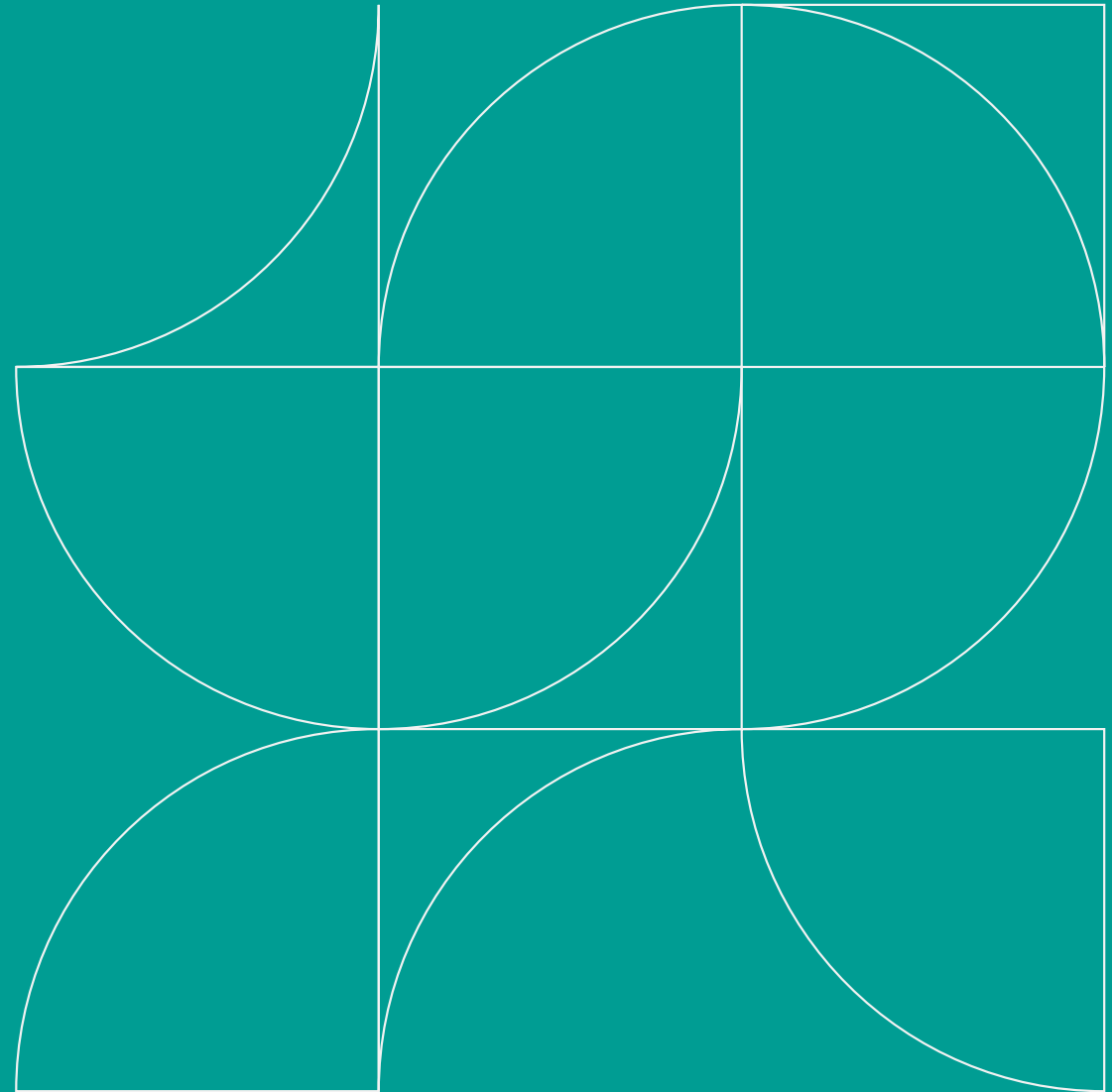
Key Point:

- *All is Not Lost: Manageability is Still a **Crucial** Defense Argument in PAGA Cases, and Should be Utilized in Various Ways to Various Ends*

Benchmarks

- **Demurrer/Responsive Pleading Stage** – Sometimes just to set the table, and even/always in CMCs.
- **Discovery Stage** – Motions to sequence discovery/bifurcate trial, and the like.
- **Motions to Dismiss/Strike:** Timing/scope are key.
- **Trial plan, trial plan, trial plan.....say it with me.**

Best Practice Tips For Responding to Plaintiffs Splitting Class and PAGA Claims



Two Near-Identical Lawsuits

Class Claims Only

vs.

PAGA Claims Only

15
16 MICHAEL SCOTT, on behalf of himself and all
17 others similarly situated,

18 Plaintiff,

19 v.

20 DUNDER MIFFLIN PAPER COMPANY, INC.

21 Defendant.

Case No. 2022-000001

CLASS ACTION COMPLAINT

1. Failure to Pay Minimum Wage
2. Failure to Pay Overtime Wages
3. Failure to Provide Meal Periods
4. Failure to Provide Rest Periods
5. Failure to Provide Accurate Wage Statements
6. Waiting Time Penalties
7. Failure to Reimburse Business Expenses

15
16 MICHAEL SCOTT, on behalf of himself, all
17 aggrieved employees, and the State of California
as a Private Attorney General,

18 Plaintiff,

19 v.

20 DUNDER MIFFLIN PAPER COMPANY, INC.

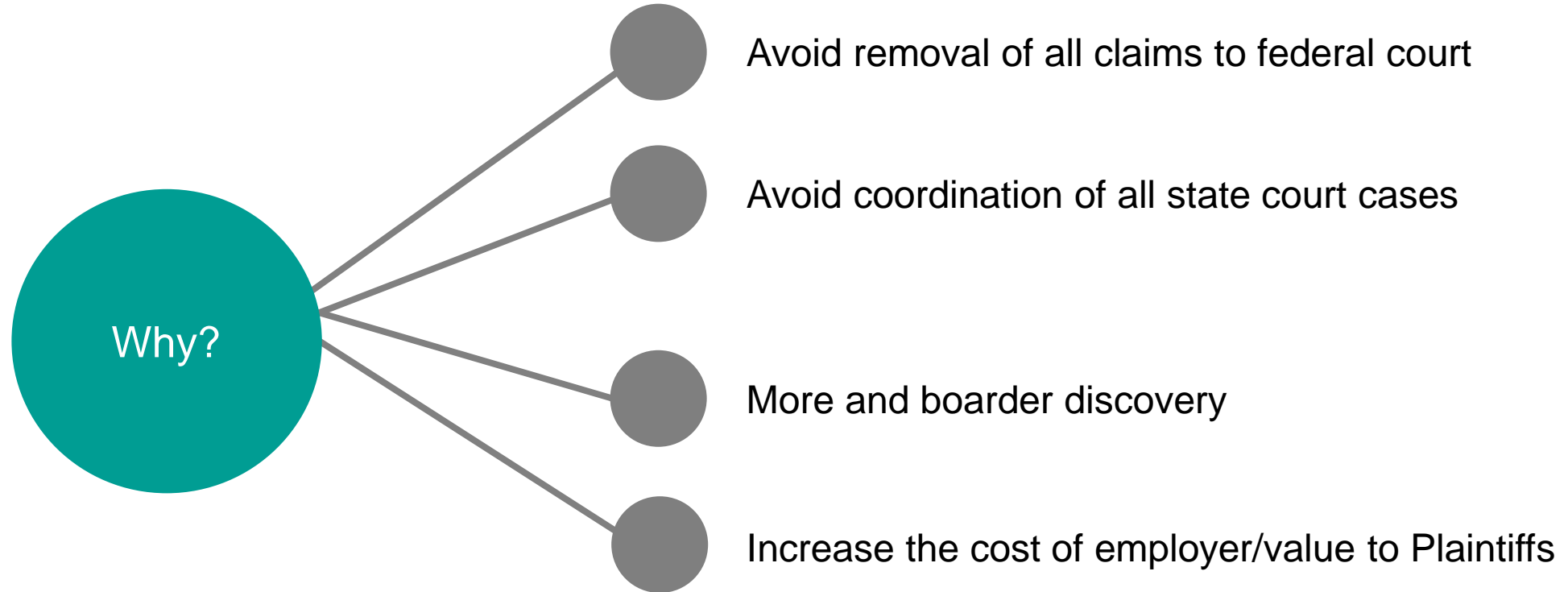
21 Defendant.

Case No. 2022-000002

PAGA REPRESENTATIVE ACTION COMPLAINT

1. Failure to Pay Minimum Wage
2. Failure to Pay Overtime Wages
3. Failure to Provide Meal Periods
4. Failure to Provide Rest Periods
5. Failure to Provide Accurate Wage Statements
6. Waiting Time Penalties
7. Failure to Reimburse Business Expenses

What Is Plaintiffs' Counsel's Motivation?



Responses Available to an Employer

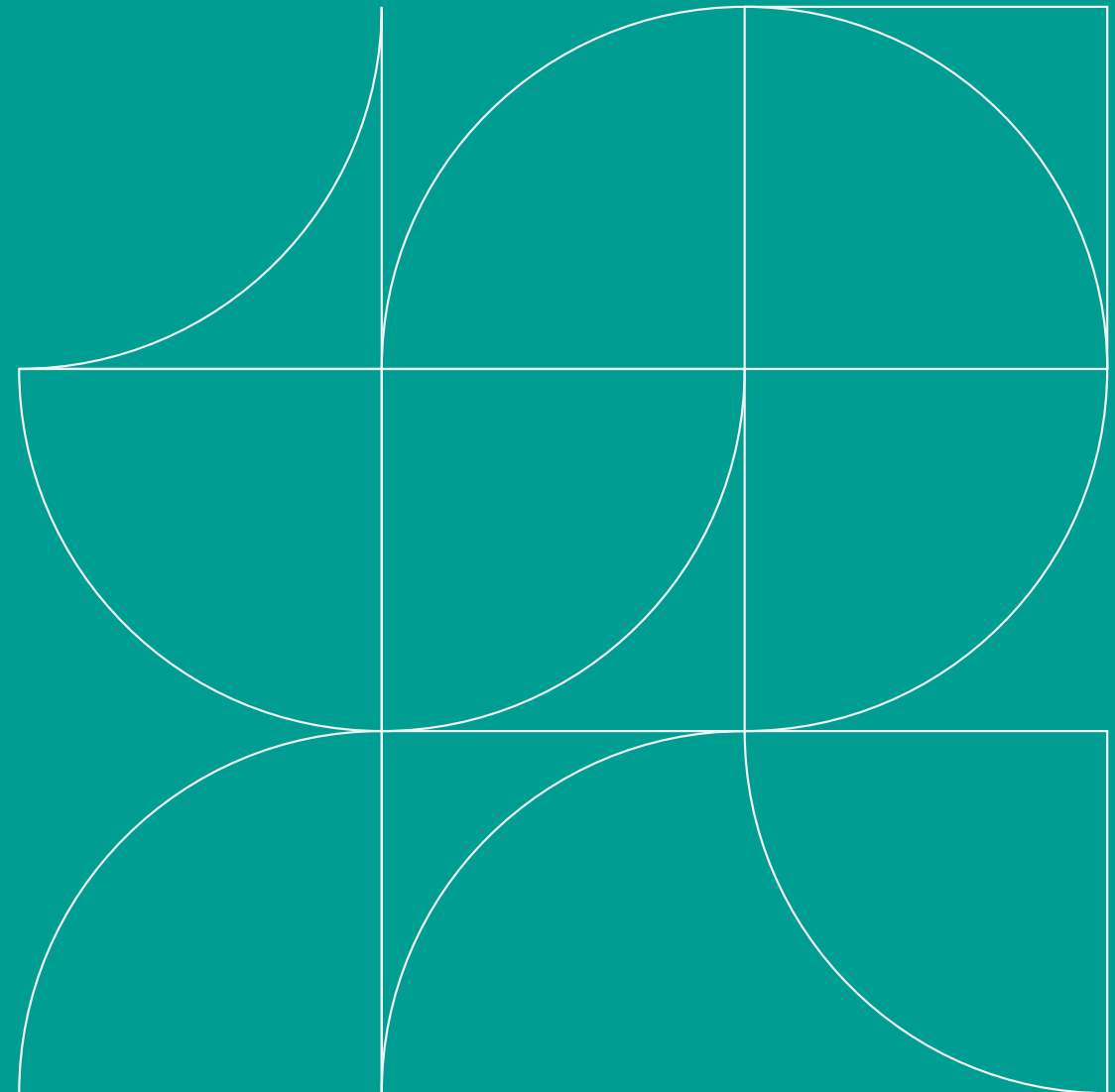
Is removal of
the PAGA-
only action
available?

Motion to
stay the
PAGA-only
case

Is the PAGA-
only case
designated as
complex?

Ask
Plaintiff to
consolidate
themselves

Addressing Overlapping and Follow-On PAGA Claims



Reminder:

Why Are PAGA
Claims So Popular?

Attorney Fees

No Opt Outs

Class Action Requirements Do Not Apply

But Really, Attorney Fees

Overlapping Claims

This is where *different plaintiffs (and separate counsel)* bring claims covering the same time period and defendants for similar or nearly identical claims.

How?

- Separate LWDA Notices [no limit]
- One may add a slightly different claim or Labor Code provision or simply describe different facts
- Different definition of “aggrieved employee” population

Why?

- Plaintiff seeks to extract their own enhancement award and separate fees
- Plaintiff believes there are deficiencies in original claim

Fighting Back:

- Leverage the competition to settle claims at best rate
- Stay Top-Filers à la *Shaw v. The Superior Court of Contra Costa County*, Case No. A163263 (May 3, 2022)

Follow-On Claims

This is where *multiple plaintiffs (and separate counsel)* bring **serial** claims covering the same defendants and similar or nearly identical claims, but with a PAGA period starting after the end of the prior matter's settlement release period.

How?

- Serial PAGA Letters
 - No limits to file
 - No regard to prior settlements
- Serial Complaints
 - Different courts
 - Top filer
 - Wait to file after a settlement

Why?

- Possibly join an earlier-filed case that has *not* settled and extract a portion of the fees while settlement is being finalized
- Wait a new, short period and obtain easy fees with little work as the employer has already looked at all of the issues

Fighting Back:

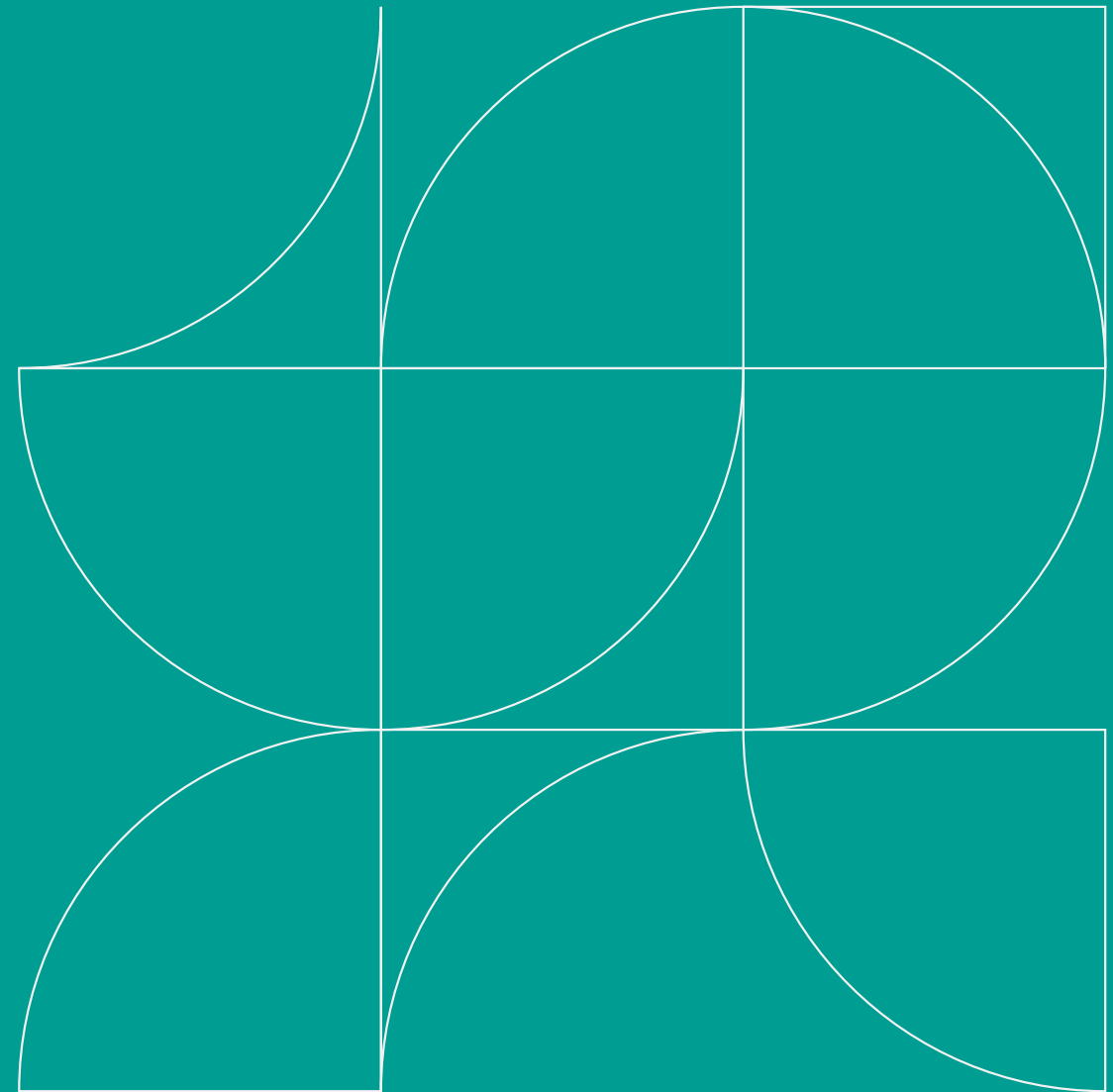
- Lessons Learned Debrief and then . . . Take Action!
- Consider PAGA Waivers post-Viking River

Conspiracy?

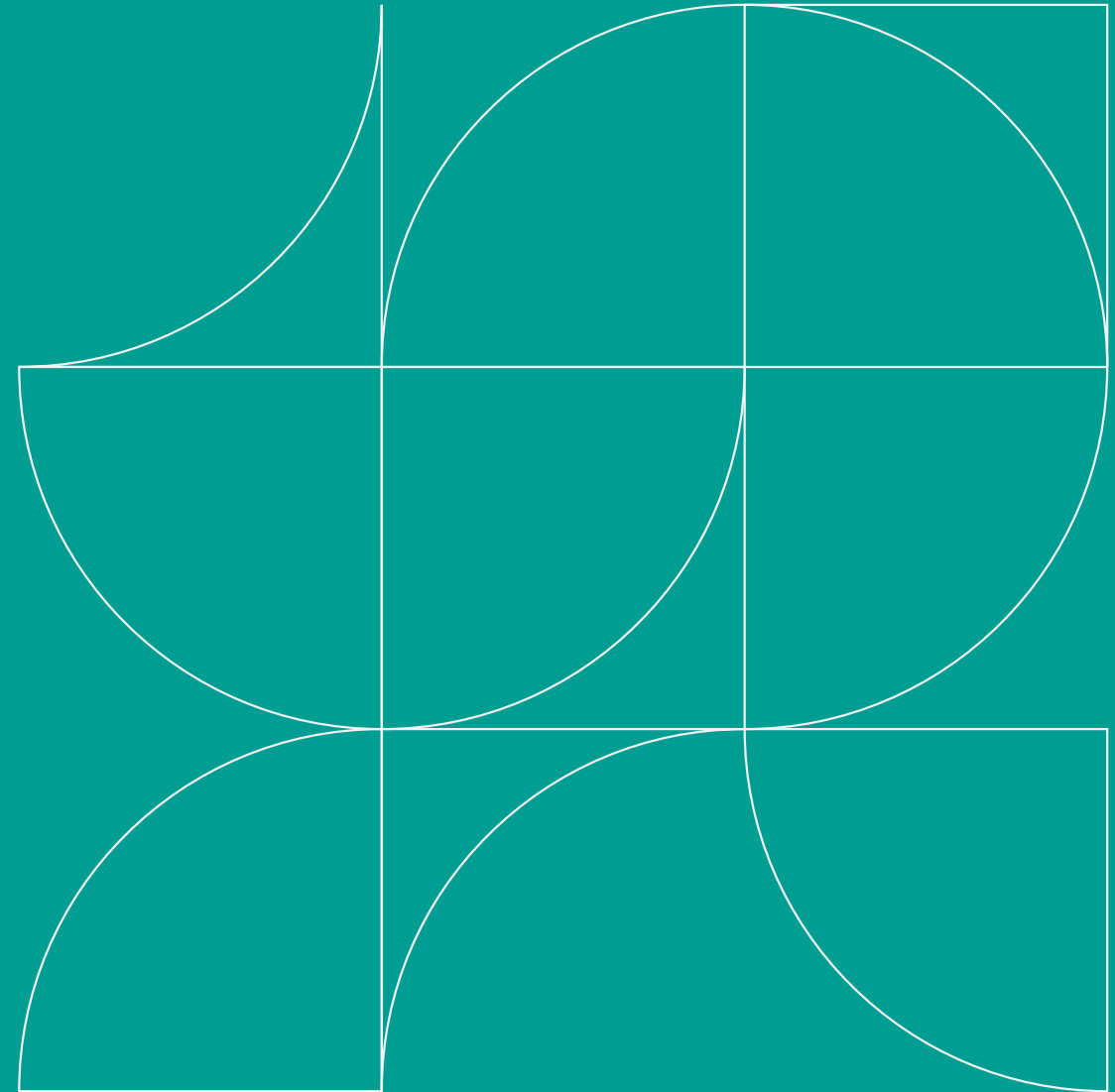
- Are Plaintiffs' Counsel Coordinating?

- Likely no, but some may be trolling the LWDA online repository to see who has pending PAGA letters and then seeking out potential plaintiffs.
- Often, first-filed counsel has no idea that they are being or have been top-filed by one (or sometimes more) additional plaintiffs' firms coming to the trough.

CLE



Key Recent PAGA Developments



Other Important Trends, Cases, and Developments

Response to *Viking River*

- Some plaintiffs' counsel settling PAGA claims individually.
- More are seeking to preserve their cases to buy time.

Other Key Cases

- *La Face v. Ralph's Grocery Co.* – Court of Appeal confirmed no constitutional right to jury trial in PAGA cases.
- *Calif. Bus. & Indus. Alliance v. Becerra* – PAGA is constitutional.

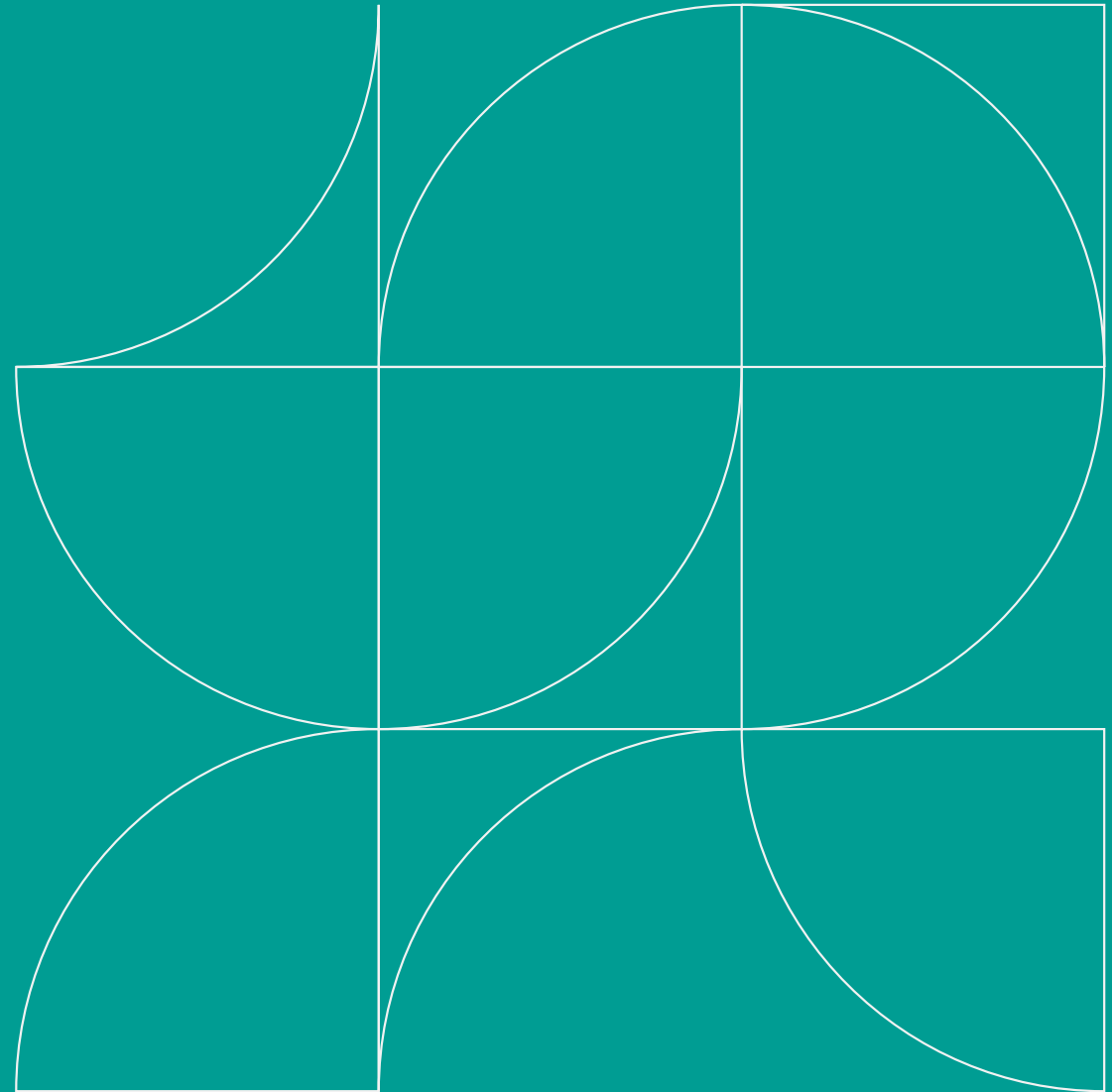
Statutory

- Janitorial Exemption in L.C. section 2699.8, effective 1/1/22.
- Second industry PAGA exemption now, after the construction industry.

Ballot Initiative

- The Fair Pay & Employer Accountability Act is DOA for November '22 ballot.
- Proponents will try to qualify it for the 2024 election.

Questions?



**thank
you**

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