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LAW OFFICES OF JEFFREY SU
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Riverdale, Columbia

INTEROFFICE MEMORANDUM

TO: Jeffrey Su

FROM: Applicant

DATE: July 28, 2016

RE: Wong v. Pavlik Foods, Inc.

In this memorandum, pursuant to your request, I have provided the legal authority in answering your questions relating to the legal imediments presented in both the (1) Class Action under Columbia Business Code section 17200; Unfair Competition Law ("UCL") and the (2) Representative Action under Columbia Labor Code section 2699; Private Attorney General Act ("PAGA"). If you have any questions or need further clarification, please let me know.

1. The facts sufficiently support certification of a class of current and former employees for recovery of back wages under the UCL.

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice" and that "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of §17204 and complies with §382 of the Code of Procedure." The Columbia Supreme Court has interpreted §382 as authorizing class actions. Therefore, read together, these provisions leave no doubt that a plaintiff seeking to maintain a class action under the UCL must satisfy the stringent requirements. (Arentz v.

Angelina Dairy)

UCL §17204: Standing Requirements

First, we look to the standing requirements of 17204, which states that actions for relief pursuant to the UCL shall be prosecuted . . . by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition. (UCL) Some violations found under the UCL include failure to credit Plaintiff for all hours worked, to pay overtime wages, to pay wages when due, to pay wages due upon termination, to provide rest and meal periods, and to obtain written authorization for deducting or offsetting wages. (Arentz)

Here, Arnold Wong (hereinafter, Wong) has personally suffered injury in fact and lost money as a result of more than one of the violations listed above. In his interview with you, he shared that he was supposed to be paid \$15/hour, but more often than not Wong would have to work through his one-hour lunch period, but would not get paid for that hour he marked in his time sheets. (Interview) In fact, Mr. Palvik would deduct that hour and not pay Wong, which is a direct violation of obtaining written authorization for deducting wages earned. Moreover, Palvik would tell Wong that if he did not take his lunch period, it was not his fault, but Wong explained that work got so busy that he had no other choice. (Interview) The UCL requires that an employer must provide rest and meal periods, thus, another clear violation. Additionally, Wong shared that he almost always worked 9 or 10 hours a day, and around the year-end holidays he worked 6 full days, leaving Sunday as his only day off, and yet would never receive overtime pay as the law requires (time and a half) (Interview) This is another direct violation of failure to pay overtime wages. Finally, Wong explained that after Palvik fired him, he did not pay what he was owed for the last week's of earned wages, which is a failure to pay wages due upon termination.

Therefore, Wong has a clear case that he has suffered an injury in fact and has lost wages owed to him as a direct result of various violations by Palvik.

In conclusion, as you have also noted in your memorandum, Wong has a strong, individual case under the UCL.

CCP §382: Class Actions

_____Second, your question was focused on the class actions requirements and whether Wong's case meets those requirements in order for him to bring a representative suit under the UCL. Whether we turn to Columbia's Procedural Code or the Federal Rules of Civil Procedure Rule 23, does not make a difference because the our Supreme Court has held that this Columbia code section is to be applied and interpreted in the same way as Rule 23 of the FRCP is applied to class actions brought in federal courts. (Campbell) Rule 23 requires four basic essentials for maintenance of class actions: (1) Numerosity, (2) Commonality, (3) Typicality, (4) Adequacy of Representation.

_____ **(1) Numerosity:** The class must be so numerous that joinder of all member is impracticable. Here, Palvik employes anywhere from 350 to 400 hourly plant workers in a given year. The number is difficult to track as Wong suggested there is a lot of turnover. (Interview) All these workers are specifically hourly workers and are within different groups within the plant. For example, the skimmers, the carcass handlers, the deboners, the butchers, and so forth. (Interview) Thus, it would very much be impracticable to join all few hundred members and more (i.e. former employees) in one suit. **Thus, this element is met.**

(2) Commonality: The questions of law or fact must be common to the class. Here, Wong shared that Palvik would cut deals for different groups and pay other groups differently from time to time. And although he cannot say that everyone was equally and lost the same amount of wages, he has suggested that he can assure that a majority, if not all, have lost some kind of pay, whether

it be overtime, their final pay, or cut short when Palvik paid them cash.

(Interview) He can testify to all this because he had many guys call in who were fired to ask about when they would receive their final pay, or come to him to ask why they didn't receive a certain amount that pay period as they were expecting. (Id.) Wong believes Palvik has such practices and has been able to keep up so long because many of the workers are in the country illegally, which goes to his point about anyone that complains to Palvik gets fired.

Therefore, there is a strong showing of commonality as to the facts, but more over, as to the law because Palvik is violating the same laws over and over again with all his employees. However, they just happen to be at different times and with different groups. **Nonetheless, commonality will be met simply based on the common question of law that Palvik continuously violates.**

(3) Typicality: The claims of Wong must be typical of the claims of the entire class. Here, Wong's injuries are due to many of the same violations that the other employees have been hit by. Wong shared that he has not received overtime for much of the hours he stayed 9-10 hours; employees have also kept track of their own hours and asked Wong why they were not paid more, when they in fact worked more hours. Wong did not receive his final pay, just as many others did not receive theirs. Wong had to work through lunch to get his work done usually, and he suggests that lunch was actually a hit-and-miss proposition for just about everyone; some workers got time off, others didn't. (Interview) All these facts found in his interview with you show typicality can be met despite the differences that may be found between employees and different groups. The fact is Palvik is violating a handful of Business Code rules over and over again, just at different times. For these reasons, I believe the court will be able to find typicality. Even more so because many of the employees, including Wong have kept their own records and evidence. They will be able to compile the data to in fact, show there is even typicality amongst the amounts lost from unpaid wages.

Therefore, typicality can be met with a bit more investigation and organization of the hard facts.

(4) Adequacy of Representation: Wong must be able to fairly and adequately protect the interests of the class. Here, as suggested above in standing, Wong is a solid choice for standing in for all the members. Firstly, the members trust Wong, as many of them have come to him over the years to ask why their pay has been cut, and so forth. This is also because Wong has worked for Palvik since approximately November 1996. Wong himself has been severely injured, and is in charge of keeping bookkeeping records, he has kept all of Palvik's notes that provide convincing evidence that Palvik is in fact in violation of the UCL. Moreover, Wong has even requested that we be able to recover the employees, both current and past, unpaid wages if possible. He obviously will be able to adequately represent as he had an important role in this matter (i.e. bookkeeping, etc), but also he will be able to fairly represent the class members because he is now fired and has no interest or obligation to Palvik.

Thus, Wong meets the adequacy of representation element.

In conclusion, based on the facts Wong has brought forth thus far, the questions of fact and law common to the class members predominate over questions of fact and law affecting each individually. For these reasons, I believe we have strong and sufficient facts to support the certification of a class of current and former employees for the recovery of back wages under the UCL.

2. There are three arguments that could be made as to bringing a representative claim under PAGA without satisfying the class certification requirements.

The PAGA does not require that we satisfy class certification

requirements for a number of reasons. Our Supreme Court relied on three reasons: (1) Labor Code Section 2699 (a) state that "Notwithstanding any other provision of law" an aggrieved employee may bring an action against the employer "on behalf of himself or herself and other current or former employees". (2) unlike the UCL, the PAGA does not expressly require that representative actions comply with CCP 382, and (3) a private plaintiff suing under the PAGA is essentially bringing a law enforcement action designed to protect the public. (Abel)

Labor Code 2699

Here, this section expressly states that Wong, as an aggrieved employee may bring an action against Palvik on behalf of himself and other current and former employees. Since Wong is an "aggrieved employee", this section applies to him, and is a sufficient argument. (Arentz)

PAGA does not expressly require

_____The UCL requires the class action because in a class action any member may opt out of the class and the judgment will bind all members who do not opt out. However, under the PAGA, it would not be in the interest of the State to bind all members if they do not opt out for whatever reason, whether it be not receiving notice or did not understand the legal system (as they are in the country illegally). While the PAGA does bind both the Labor Agency and members by the judgment, it provides a collateral estoppel upon the unnamed class members, which allows or rather does not deprive these individual members to seek a separate and individual action to recover for unpaid wages and other remedies. Essentially, there is a strong argument for not needing to satisfy the class action requirements in order to bring a PAGA action because then class members will not limit their right to pursue or recover other remedies available under state or federal law, and those that Wong was unable to obtain as a class representative.

Further, the Legislature enacted the PAGA and declared its intentions and purposes. The PAGA stands in order to achieve maximum compliance with state labor laws. Since there was adequate financing of labor law enforcement and staffing levels declined and were unlikely to keep pace with the future growth of the labor market, and there would always be a need and public interest to protect aggrieved employees, the PAGA was the solution, such that private individuals would stand in the shoes of the labor law enforcement agencies and bind both the agency and the individual and other employees that are being represented, as well.

Additionally, the court is likely to favor PAGA's purpose, but also case law precedent. A suit under the PAGA may be brought in a representative manner because the Labor enforcement created the Act in order to give individuals the rights and powers the Labor Agency had. In other words, the PAGA functions as a substitute for an action brought by the government itself, a judgment in that action binds all, including nonparty aggrieved employees, who would be bound by a judgment in an action by the government. The PAGA was created for reasons of supplementing enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. (Arentez)

____ Therefore, this is also another strong argument available, pursuant to your question.

Protect the public

____ Moreover, since the PAGA acts as a substitute and supplement to law enforcement of these public agencies and their rules, then this also suggests that actions under the PAGA, even when brought by individuals, are also only for the sole purpose of seeking statutory penalties for Labor Code violations. Further, an action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.

Therefore, as described above as well, the employee's action under the Act binds both the employee and the state labor law enforcement agency, all while maximizing compliance despite the shortage of adequate financing and shortage of staff to go after every claim. Employers acting as proxies serve the purpose of protecting the public, just as much as the Labor Agency bring suit themselves. **In short, more compliance means that more of the public is being protected.**

3. Questions regarding monetary relief:

(a) The civil penalties under the UCL are recovered by both the state agency and the members.

The UCL is analogous to the PAGA because UCL 17206 provides that the civil penalty recovered in the civil action will be assessed and recovered in the name of the people of the State of Columbia. This line alone suggests that the Business Code was also created in order to protect the public against unlawful, unfair or fraudulent business act or practices. Additionally, an action under the UCL may be brought by an injured individual, as described above. These together show, similarly to the PAGA act, either an individual may bring suit for their injuries, or they may bring suit with a representative purpose, which suggests that the representing plaintiff is standing in the shoes of the State Agency.

For these reasons, we may apply the same rules that apply to the division of civil penalties recovered under PAGA. PAGA 2699 (a) states that civil penalties will be collected by the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, and as an alternative, may be recovered through civil action brought by an aggrieved employee on behalf of himself and other current or former employees. Next, the Labor Code 558, which

must also be complied to by the PAGA, states that wages recovered shall be paid to the affected employee specifically. However, as to civil "penalties", case law provides that the civil penalties recovered will be retained 75% by the Labor and Workforce Development Agency and 25% for the "aggrieved employees". (Arentz) The reasons for the 75/25% split is so that the judgment binds both the agency and the members, since the individual is essentially standing in for the agency that cannot possibly cover all the claims they receive.

This same analysis applies under the UCL. As stated above, the UCL also protects the public and employees who are are aggrieved employees due to such violations. In a Superior Court, here in Columbia a plaintiff brought an action to recover unpaid wages for himself and class of employees on the basis of numerous violations of the Columbia Labor Code, and based his recovery upon Columbia Business Code Section 17200. (Abel) This example is to show that the Labor Code violations also fall under the Business Code unlawful acts and practices. As listed above, many of them overlap with the many possible violations you have presented to me in your memo. (Interoffice Memorandum) Therefore, the applicable statutes of the Labor Code will also be applicable to the UCL.

_____ In conclusion, the division may either be the same 75/25% split with the Business Agency that enforces the UCL.

(b) The prerequisites that must be satisfied before filing suit under the PAGA are as follows:

According to both case law (Arentz) and PAGA 2699.3, the prerequisites that must be satisfied prior to filing suit under the Act are that (1) Wong shall give written notice by certified mail to the LWD Agency and the Palvik of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation(s). Additionally, (2) the agency shall then

notify Palvik and Wong by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to (1). Upon receipt of that notice of if no notice is provided within 33 calendar days, then Wong may commence a civil action pursuant to 2699 of the Act.

Here, Wong suggested that a few employees have complained to the Labor Board, but he does not believe any action has ever been taken. He has been employed by Palvik since 1996, so it is likely he would have heard of such action being taken. Moreover, he mentioned that the processing plant is "way out in Gaston County, so [he doesn't] think it. . .[is] on the Labor Board's priority list." (Interview). It would be my guess that both these steps need to first be met prior to commencing a civil action under the PAGA.

Moreover, all the possible violations are listed in your memo you provided to me on July 25, in addition to those listed in the Labor Code statute.

(c) The employees do not keep all of the civil penalties we may recover under the PAGA.

As discussed in the section above (a), I provided the rule as to how civil penalties may be recovered under the PAGA. They will be divided as follows: "75% goes to the Labor Workforce Development Agency, leaving the remaining 25% for the "aggrieved employees". However, as established by the Labor Code 558 (a) (3) all wages recovered shall be paid to the affected employee. Nonetheless, when it comes to specifically civil penalties, which range from \$50 to \$100 per underpaid employee for each pay period, the split of 75/25 will be applicable.

I hope all of your questions have been answered. However, if you have any

questions or need clarification, please let me know. I will be happy to look into any other questions you may have.

Question #1 Final Word Count = 3127

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