APPENDIX

APPENDIX A

Court of Appeal, First Appellate District,
Division Three - No. A155717

S270638

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MELANIE WINNS et al.,
Plaintiffs and Respondents,

v.

POSTMATES INC.,
Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

[Filed October 13, 2021]

APPENDIX B

Filed 7/20/2021

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MELANIE WINNS ET AL.,
Plaintiffs and Respondents,

v.

POSTMATES INC.,
Defendant and Appellant

A155717

(San Francisco County Super. Ct.
No. CGC-17-562282)

Postmates Inc. (Postmates) appeals from the trial court's order denying its petition to compel arbitration of a Private Attorney General Act (PAGA) claim for civil penalties brought by Plaintiffs Melanie Ann Winns, Ralph John Hickey Jr., and Kristie Logan (collectively Plaintiffs). In denying Plaintiffs' petition with respect to their PAGA claim, the trial court followed our Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*), which held that representative action waivers were unenforceable. We reject Postmates' arguments that *Iskanian* was

abrogated by subsequent United States Supreme Court decisions and affirm the order denying the motion to compel arbitration of the PAGA claim.

FACTUAL AND PROCEDURAL BACKGROUND

Postmates is a technology company that connects customers needing delivery services with "couriers"—third-party delivery providers—through its website or smartphone app. Postmates' website and app enable customers to arrange for the delivery of items from local businesses by placing orders electronically.

Beginning on March 1, 2017, prospective couriers seeking to offer their delivery services were presented with Postmates' Fleet Agreement when logging onto the app for the first time. Before offering delivery services, a courier had to agree to the Fleet Agreement, which was intended to govern the relationship between Postmates and couriers.

The Fleet Agreement directs a prospective courier as follows: "Please review the mutual arbitration provision set forth below in Section 11 carefully, as it will require you to resolve disputes with Postmates on an individual basis, except as otherwise provided in Section 11, through final and binding arbitration unless you choose to opt out of the mutual arbitration provision. By digitally signing this agreement, you will be acknowledging that you have read and understood all of the terms of this agreement (including the Mutual Arbitration Provision in Section 11) and have taken time to consider the consequences of this important business decision." (Bold and block capitals omitted.)

The Mutual Arbitration Provision in Section 11 of the Agreement provides that Postmates and

couriers "mutually agree to resolve any disputes between them exclusively through final and binding arbitration instead of filing a lawsuit in court." This applies to "any and all claims between the [p]arties," including but not limited to claims related to a courier's classification as an independent contractor, the delivery fees received by a courier for deliveries, and state and local wage and hour laws. Under its terms, the Provision is "governed exclusively by the Federal Arbitration Act (9 U.S.C. §§ 1-16) ('FAA')."

In addition, the Mutual Arbitration Provision includes a "Representative Action Waiver." (Bold omitted.) This waiver provision states that the parties "mutually agree that any and all disputes or claims between the [p]arties will be resolved in individual arbitration. The [p]arties further agree that by entering into this Agreement, they waive their right to have any dispute or claim brought, heard or arbitrated as a representative action, or to participate in any representative action, and an arbitrator shall not have any authority to arbitrate a representative action."

The Fleet Agreement gives couriers the right to opt out of arbitration. The opt out provision states: "Arbitration is not a mandatory condition of [the courier's] contractual relationship with Postmates, and therefore Contractor may submit a statement notifying Postmates that Contractor wishes to opt out of this Mutual Arbitration Provision." (Bold omitted.) A courier wishing to opt out does so by submitting an "Opt Out Form" to Postmates within 30 days of agreeing to the Fleet Agreement.

Plaintiffs all worked as Postmates couriers and completed deliveries through the app after March 1, 2017. In doing so, all three plaintiffs necessarily

acknowledged the Fleet Agreement. Postmates did not receive opt out forms for any of them.

In December 2017, Plaintiffs filed their operative first amended complaint against Postmates as a putative class and representative action.[1] Plaintiffs alleged individual and class claims under the Labor Code and Unfair Competition Law. They alleged in part that Postmates illegally withheld wages and took gratuities given to couriers. They alleged that they and all other couriers in California who had delivered through the Postmates app had been misclassified as independent contractors instead of employees. They also alleged representative claims under PAGA for which they sought civil penalties and statutory damages for underpaid wages under Labor Code section 558.

In January 2018, Postmates moved to compel arbitration of Plaintiffs' claims for damages and underpaid wages claim pursuant to the Fleet Agreement and to strike the class allegations. They also sought to stay Plaintiffs' claim for civil penalties under PAGA pending the outcome of arbitration, as Postmates deemed the PAGA claim derivative of Plaintiffs' other claims.

After Plaintiffs filed their motion, the United States Supreme Court decided *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612 (*Epic Systems*). In supplemental briefing directed at Plaintiffs' PAGA

---

[1] Steven Alvarado was also among the named plaintiffs who filed the complaint. Since Postmates has "expressly stated that Plaintiff Steven Alvarado's claims are not at issue in this appeal because he properly opted out of the arbitration agreement," we do not refer to him in our background discussion or in our analysis, *infra*.

civil penalty claim, Postmates argued that *Epic Systems* implicitly overruled the California Supreme Court's opinion in *Iskanian*, *supra*, 59 Cal.4th 348, to the extent *Iskanian* held that PAGA waivers in arbitration agreements were unenforceable. On that basis, Postmates requested that Plaintiffs also be compelled to arbitrate their PAGA claim for civil penalties.

Following a hearing, the trial court issued an order granting in part and denying in part Postmates' motion. After finding that a valid arbitration agreement existed between the parties, the court granted the motion to compel arbitration with respect to Plaintiffs' individual claims, including their claim under Labor Code section 558. It stayed the class claims pending an arbitrator's determination of whether the FAA or California law governed the Fleet Agreement.

As to Plaintiffs' PAGA civil penalty claim relevant here, the court held that it could not compel that claim to arbitration and stayed the claim pending the outcome of the arbitration of Plaintiffs' individual claims. The court concluded that *Epic Systems* did not compel Plaintiffs to arbitrate that claim as *Epic Systems* "addressed only the question of whether class or collective action waivers were enforceable under the FAA," and "did not address the enforceability of waivers of representative actions, such as those brought under PAGA," and thus "representative action waivers remain unenforceable under *Iskanian*." The court also held arbitration of Plaintiffs' PAGA civil penalty claim was barred under a clause in the parties' arbitration agreement stating that "'an arbitrator shall not have any authority to arbitrate a representative action.'"

This appeal followed.

DISCUSSION

On appeal, Postmates seeks reversal only of the trial court's order denying Postmates' motion to compel Plaintiffs Winns, Hickey, and Logan to arbitrate their PAGA claim.[2] Postmates submits it was error for the trial court to refuse to enforce the arbitration agreement according to its terms because *Iskanian* does not apply and was effectively overruled by *Epic Systems.* Based on our de novo review (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 864), we reject these contentions and conclude the trial court properly denied Postmates' petition to compel arbitration of Plaintiffs' PAGA claim.

PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state." (*Iskanian*, *supra*, 59 Cal.4th at p. 360.) The Legislature enacted PAGA "to remedy systemic underenforcement of many worker protections" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545) and to enhance the state's enforcement of labor laws by "'allow[ing] aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies [are] to retain primacy over private

---

[2] Plaintiffs' appellate brief discusses several issues outside the scope of Postmates' appeal, including issues involving Steven Alvarado. Since Steven Alvarado's claims are not at issue in this appeal, as noted previously, we disregard these and other non-responsive arguments.

enforcement efforts'" (*Iskanian*, at p. 379). Although PAGA empowers employees to act as the agent of the Labor Commissioner, the governmental entity "is always the real party in interest." (*Id.* at p. 382.) A PAGA action is therefore "a type of qui tam action" ""designed to protect the public and not to benefit private parties."" (*Id.* at pp. 382, 387.)

In *Iskanian*, the California Supreme Court examined two related questions regarding the pre-dispute waiver of PAGA claims: (1) whether arbitration agreements requiring employees to waive their right to bring PAGA actions are unenforceable under state law and, if so, (2) whether the FAA preempts that rule. (*Iskanian*, *supra*, 59 Cal.4th at p. 378.) First, the court held that pre-dispute waivers requiring employees to relinquish the right to assert a PAGA claim on behalf of other employees were prohibited, as such waivers violate public policy and "harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations." (*Id.* at p. 383.) Second, the court held the FAA did not preempt this rule invalidating PAGA waivers in arbitration agreements because "the FAA aims to ensure an efficient forum for the resolution *of private* disputes, whereas a PAGA action is a dispute between an employer and the state [Labor and Workforce Development] Agency." (*Id.* at p. 384.) PAGA actions "directly enforce *the state's* interest in penalizing and deterring employers who violate California's labor laws." (*Id.* at p. 387.) The FAA, which "aims to promote arbitration of claims belonging to the private parties to an arbitration agreement," "does not aim to promote arbitration of claims belonging to a government agency." (*Id.* at p. 388.) This "is no less true when such a claim is brought by a statutorily designated proxy for the

agency as when the claim is brought by the agency itself. The fundamental character of the claim as a public enforcement action is the same in both instances." (*Ibid.*)

As a threshold matter, Postmates argues *Iskanian* does not apply because Plaintiffs had an opportunity to opt out of the arbitration agreement and representative action waiver but did not. Observing the *Iskanian* court's conclusion "that an arbitration agreement requiring an employee as a *condition of employment* to give up the right to bring representative PAGA actions in any forum is contrary to public policy" (*Iskanian*, *supra*, 59 Cal.4th at p. 360, italics added), Postmates contends the trial court improperly relied on *Iskanian* since agreeing to arbitration or the waiver was not a mandatory condition of a courier's employment. We disagree. *Iskanian*'s holding that a PAGA waiver was unenforceable was premised on the public policy rationale that a PAGA waiver improperly circumvents the Legislature's intent to empower employees to enforce the Labor Code as agency representatives and harms the state's interest in enforcing the Labor Code. (*Id.* at pp. 386–387.) *Iskanian* did not turn on how the worker entered into the arbitration agreement, or the mandatory or voluntary nature of the worker's consent to the agreement. Accordingly, Plaintiffs' ability to opt out of the Fleet Agreement, or their election not to do so, does not impact our analysis.

Postmates' principal argument that *Iskanian*'s PAGA waiver rule cannot survive *Epic Systems* and its progeny is also unavailing. "On federal questions, intermediate appellate courts in California must follow the decisions of the California Supreme Court,

unless the United States Supreme Court has decided the *same* question differently." (*Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 619 (*Correia*); see also *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 507.)[3] Neither *Epic Systems* nor its progeny addressed the same PAGA waiver issue decided by *Iskanian*, and thus *Iskanian* continues to control the outcome of this appeal.

Decided four years after *Iskanian*, *Epic Systems* involved employees opposed to arbitration on the ground that the arbitration agreement prohibiting class actions was illegal and unenforceable under a provision of the National Labor Relations Act that guarantees workers the right to engage in "concerted activities." (*Epic Systems*, *supra*, 138 S.Ct. at p. 1622.)

---

[3] Postmates does not analyze the standard we use to determine when an intervening U.S. Supreme Court decision overrules a California Supreme Court decision. This "same question" standard we apply here is cited and acknowledged in its briefing without dispute.

Multiple times, Postmates states that we are "'compelled to follow the rule enunciated by the United States Supreme Court,' even if the California Supreme Court previously came to a different conclusion." For this principle, Postmates cites *People v. Ledesma* (1988) 204 Cal.App.3d 682, 690 (*Ledesma*) without further discussion of the case. In *Ledesma*, the defendant appealed his second-degree murder conviction in part on the grounds that statements he made to detectives at the police station while his attorney attempted to gain access to him were improperly admitted into evidence. (*Id.* at p. 686.) The Ledesma court determined it was not bound by an exclusionary rule set forth by our Supreme Court but was instead compelled to follow one enunciated by the U.S. Supreme Court because our Supreme Court's rule had been superseded by constitutional amendment. (*See id.* at pp. 691–692.) The *Iskanian* rule concerning PAGA waivers has not been similarly superseded, so *Ledesma* provides no basis for us to disregard our Supreme Court's controlling authority.

The U.S. Supreme Court rejected any NLRA exception to the FAA and reiterated that the FAA instructs federal courts to enforce arbitration agreements according to their terms. (*Id.* at pp. 1610, 1624.) As the U.S. Supreme Court explained, the question in *Epic Systems* was whether employees and employers should "be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in *class or collective actions*, no matter what they agreed with their employers?" (*Id.* at p. 1619, italics added.) In addressing these questions, the U.S. Supreme Court did not decide or consider whether a worker may waive a right to bring a *representative* action on behalf of a state government. Thus, the Court's reasoning in *Epic Systems* did not address the basis for our Supreme Court's decision in *Iskanian*, namely, that a PAGA action is not an individual dispute between private parties but an action brought on behalf of the state by an aggrieved worker designated by statute to be a proper representative of the state to bring such an action. Accordingly, *Epic Systems* did not consider the same issue concerning PAGA waivers decided in *Iskanian*, much less reach a contrary conclusion on that issue.

It is therefore not surprising that California courts have uniformly rejected the argument that *Epic Systems* overruled *Iskanian.* In *Correia*, the court rejected the employer's argument that *Iskanian* was no longer binding in light of *Epic Systems.* (*Correia*, *supra*, 32 Cal.App.5th at p. 609.) Noting that *Epic Systems* "reaffirmed the broad preemptive scope of the [FAA]," the court explained the case still "did not address the specific issues before the *Iskanian* court involving a claim for civil penalties brought *on behalf of the government* and the

enforceability of an agreement barring a PAGA representative action in any forum." (*Ibid.*) *Correia* further added that the claim at issue in *Epic Systems* differed "fundamentally from a PAGA claim" because the employee in *Epic Systems* was "asserting claims on *behalf of other employees*," whereas a plaintiff who brings a PAGA action has "been deputized by the state" to act "'as "the proxy or agent" of the state'" to enforce the state's labor laws. (*Id.* at pp. 619–620.) Because *Epic Systems* did not "decide the *same* question differently," the *Correia* court concluded its "interpretation of the FAA's preemptive scope [did] not defeat *Iskanian*'s holding or reasoning for purposes of an intermediate appellate court applying the law." (*Ibid.*) The *Correia* court further decided that "[w]ithout the state's consent, a pre[-]dispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement." (*Id.* at pp. 621–622.)

In *Collie v. Icee Company* (2020) 52 Cal.App.5th 477 (*Collie*), review den. Nov. 10, 2020, S264524, the employer's argument that *Iskanian* was no longer good law after *Epic Systems* was again rejected. (*Id.* at p. 482.) The *Collie* court noted *Epic Systems* did not address "'the unique nature of a PAGA claim'" and therefore did not undermine *Iskanian*'s "characterization of PAGA claims as law enforcement actions in which plaintiffs step into the shoes of the state." (*Id.* at p. 483.) The court also held the pre-dispute PAGA waiver remained unenforceable without a showing that the state—which is the real party in interest in PAGA actions—consented to the waiver. (*Ibid.*)

We join the courts in *Correia*, *Collie*, and several other cases that have reached the same conclusion that *Epic Systems* did not overrule *Iskanian*. (See, e.g., *Provost v. YourMechanic, Inc.* (2020) 55 Cal.App.5th 982, 998 (*Provost*), rev. denied Jan. 20, 2021, S265736 [reaffirming decision in *Correia* that *Epic Systems* did not overrule *Iskanian*]; *Olson v. Lyft, Inc.* (2020) 56 Cal.App.5th 862, 872; *Contreras v. Superior Court of Los Angeles County* (2021) 61 Cal.App.5th 461, 471–472 [joining *Correia* and *Olson* in concluding that *Epic Systems* did not undermine *Iskanian*'s validity].)

The other intervening U.S. Supreme Court decisions relied on by Postmates likewise do not overrule *Iskanian.*

In *Harry Schein, Inc. v. Archer and White Sales, Inc.* (2019) 139 S.Ct. 524 (*Harry Schein*), the U.S. Supreme Court addressed the "wholly groundless" exception applied by some federal courts to avoid sending a claim to arbitration when the "argument for arbitration is wholly groundless." (*Id.* at p. 528.) The Supreme Court held the "wholly groundless" exception was inconsistent with the FAA and reiterated that when a contract delegates arbitrability to an arbitrator, the court may not override that contractual agreement. (*Ibid.*) The Supreme Court clarified that a party seeking to compel arbitration need show only that "the parties' [valid arbitration] contract delegates the arbitrability question to an arbitrator." (*Id.* at p. 529.) Once it has done so, "a court may not override the contract . . . [and] possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." (*Ibid.*)

In *Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct. 1407 (*Lamps Plus*), a hacker impersonated a company official and tricked an employee into disclosing personal information of about 1,300 other employees. (*Id.* at p. 1412.) Varela, a Lamps Plus employee, had signed an arbitration agreement when he started work at the company, but sued Lamps Plus in federal district court to bring state and federal claims on behalf of a putative class of employees whose tax information had been compromised as a result of the breach. (*Id.* at p. 1413.) The district court granted Lamps Plus's motion to compel individual arbitration but, rather than ordering individual arbitration, it granted arbitration on a classwide basis. (*Ibid.*) The Ninth Circuit found the arbitration agreement ambiguous as to whether the parties had agreed to a class arbitration waiver but construed the agreement against Lamps Plus (the drafter of the agreement) and approved the classwide arbitration. (*Id.* at pp. 1413–1415.) The U.S. Supreme Court reversed the Ninth Circuit. (*Id.* at p. 1419.) The Court observed that the FAA requires courts to enforce arbitration agreements according to their terms and preempts state law "to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." (*Id.* at p. 1415.) Noting the foundational FAA principle that "'[a]rbitration is strictly a matter of consent,'" the Court held that the FAA preempts California's *contra proferentum* rule—requiring ambiguities in a contract to be construed against the drafter—when the rule is used "to impose class arbitration in the absence of the parties' consent." (*Id.* at pp. 1415, 1418.) It specifically concluded that "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis. The doctrine of *contra*

proferentem cannot substitute for the requisite affirmative 'contractual basis for concluding that the part[ies] *agreed* to [class arbitration].'" (*Id.* at p. 1419.)

Postmates' contention that *Harry Schein* and *Lamps Plus* overruled *Iskanian* is equally unavailing. In *Harry Schein*, the "question presented [was] whether the 'wholly groundless' exception is consistent with the [FAA]." (*Harry Schein*, *supra*, 139 S.Ct. at p. 528.) In *Lamps Plus*, the Court considered "whether the FAA . . . bars an order requiring class arbitration when an agreement is not silent, but rather 'ambiguous' about the availability of such arbitration." (*Lamps Plus*, *supra*, 139 S.Ct. at p. 1412.) Neither case decided nor considered whether a worker may waive a right to bring a representative action on behalf of a state government. Neither case mentions PAGA or similar laws in other states. Nor did the reasoning in either case address the basis for our Supreme Court's decision in *Iskanian*, namely, that a PAGA action is not an individual dispute between private parties but an action brought on behalf of the state by an aggrieved worker designated by statute to be a proper representative of the state to bring such an action. Accordingly, like *Epic Systems*, neither *Harry Schein* nor *Lamps Plus* considered the same question concerning PAGA waivers decided in *Iskanian*, much less reached a contrary conclusion on that issue.

Postmates also argues we should disregard *Iskanian* because the rule it established as to the unenforceability of PAGA waivers falls outside the FAA's savings clause. The FAA savings clause prescribes that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such

grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) In *Epic Systems*, the Supreme Court observed that the FAA savings clause permitted arbitration agreements to be invalidated by ""generally applicable contract defenses, such as fraud, duress, or unconscionability"" but "offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" (*Epic Systems*, *supra*, 138 S.Ct. at p. 1622.) Since the *Iskanian* rule does not fall within the savings clause, Postmates contends it is "'displaced by the FAA.'"

Postmates' argument misses the point of *Iskanian*, which expressly established that the FAA does not preempt state law on the unenforceability of PAGA waivers. In *Iskanian*, our Supreme Court explained that "the rule against PAGA waivers does not frustrate the FAA's objectives because . . . the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency." (*Iskanian*, *supra*, 59 Cal.4th at p. 384.) Therefore, *Iskanian* held "a PAGA claim lies outside the FAA's coverage" since it was "not a dispute between an employer and an employee arising out of their contractual relationship." (*Id.* at p. 386.) Accordingly, the FAA savings clause does not apply to or constrain the PAGA waiver rule established in *Iskanian.*

Finally, Postmates contends that the various Court of Appeal decisions upholding *Iskanian* following *Epic Systems*, including *Correia*, *Collie*, and *Olson*, were wrongly decided and distinguishable. In so doing, the company cites several federal district and circuit court cases which have determined *Epic*

Systems and its progeny "require strict enforcement of individual arbitration agreements, no matter the circumstance." While federal court opinions may have persuasive value, they do not bind California courts. (*Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267, 1277, fn. 10; *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1678, fn. 5.) Nor do the opinions of our sister Courts of Appeal contro1.[4] (See *Lucent Technologies, Inc. v. Board of Equalization* (2015) 241 Cal.App.4th 19, 35.) Under the doctrine of stare decisis, we are bound to follow our Supreme Court's decision in *Iskanian* that PAGA waivers are invalid under state law. (See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455–456.) Postmates has not provided any reason for us to depart from this mandate.[5]

---

[4] The U.S. Supreme Court may soon consider the relationship between the FAA and the *Iskanian* PAGA rule. In May 2021, a petition for certiorari was filed in *Viking River Cruises, Inc. v. Moriana* (No. 20-1573), asking the high court to decide "[w]hether the [FAA] requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." In June 2021, a petition for certiorari was also filed in *Your Mechanic, Inc. v. Provost* (No. 20-1787) presenting the same question.

[5] In light of our conclusion that the trial court properly denied Postmates' motion to compel arbitration of Plaintiffs' PAGA claim under *Iskanian*, we need not address Postmates' challenge to the court's alternative ground for denying its motion based on the court's reading of the representative action waiver.

DISPOSITION

The trial court's order denying Postmates' petition to compel arbitration of Plaintiffs Winns, Hickey, and Logan's PAGA civil penalty claim is affirmed. Plaintiffs shall recover their costs on appeal.

Petrou, J.

WE CONCUR:

Fujisaki, Acting P.J.

Jackson, J.

Trial Court: San Francisco County Superior Court

Trial Judge: Hon. Andrew Cheng

Counsel: Mostafavi Law, Amir Mostafavi for Plaintiffs and Respondents.

Gibson, Dunn & Crutcher, Theane Evangelis, Michele L. Maryott, Bradley J. Hamburger, and Dhananjay S. Manthripragada for Defendant and Appellant.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 305

Sept. 24, 2018

MELANIE ANNE WINNS, RALPH JOHN HICKEY JR., STEVEN ALVARADO and KRISTIE LOGAN, individually, and on behalf of all others similarly situated,
Plaintiffs,

v.

POSTMATES, INC., a California Corporation, DOES 1-10, individuals, and DOES 11-20, inclusive,
Defendants.

Case No. CGC-17-562282

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT POSTMATES INC.'S MOTION TO COMPEL ARBITRATION AND MOTION FOR STAY

Defendant Postmates, Inc. ("defendant") moved the Court to compel arbitration of Plaintiffs Melanie Anne Winns, Ralph John Hickey Jr., Steven Alvarado, and Kristie Logan's (collectively "plaintiffs") individual claims against defendant, to strike plaintiffs' class allegations, and to stay plaintiffs' claims for penalties brought pursuant to the Private

Attorneys General Act of 2004, Cal. Lab. Code §§ 2698, *et seq.* ("PAGA") pending individual arbitration. The motion came on for hearing on September 10, 2018, and appearances are as noted in the record. Having duly considered the matter, and for the reasons stated below, the Court (1) grants the motion to compel arbitration with respect to plaintiffs Wins, Hickey, and Logan's individual claims, including their claims under Labor Code section 558; (2) stays plaintiffs Winns, Hickey, and Logan's class claims pending arbitrator's ruling on applicability of FAA; (3) stays plaintiffs Winns, Hickey, and Logan's claims for penalties under PAGA; (4) denies the motion to compel arbitration with respect to plaintiff Alvarado; and (5) stays plaintiff Alvarado's claims until the Case Management Conference set for October 30, 2018 at 1:30 p.m..[1]

I. RELEVANT FACTS

Defendant Postmates, Inc. is a San Francisco-based technology company that connects customers in need of delivery services with third-party delivery providers using a technology platform which can be accessed through defendant's website or a downloadable software application ("app") for use with smartphones. Declaration of Jason Huey ("Huey Decl.") ¶ 3. Defendant's website and app enable customers to conveniently arrange for the delivery of items from local restaurants, stores, etc., simply by placing an order electronically. *Id.* In this putative

---

[1] The Court has granted complex designation in the matter entitled *Jacob Rimler v. Postmates, Inc.*, San Francisco Superior Court Case No. CGC-18-567868. The *Rimler* case is set for a Case Management Conference on October 30, 2018 at 1:30 p.m. in Department 305 of the above-entitled court, together with the instant case.

class action, plaintiffs, who are "drivers" or "couriers" for defendant, assert causes of action for **(1)** repayment of wages to employer in violation of Labor Code § 221; (2) failure to pay minimum wage in violation of Labor Code §§ 1194 and 1197.1; (3) coercion in violation of Labor Code § 450; (4) unauthorized form of payment of wages and gratuities in violation of Labor Code § 213; (5) disposition of gratuities in violation of Labor Code §§ 35-346; (6) failure to pay wages due former employees in violation of Labor Code §§ 201-203; (7) effect of arbitration agreement to enforce payment of wages in violation of Labor Code § 229; (8) penalties pursuant to Labor Code §§ 2698-2699.5 "Private Attorney General Act"; (9) violation of Labor Code § 558; and (10) unfair competition pursuant to Business & Professions Code § 17200. *See* First Amended Complaint, filed December 22, 2017.

On March 1, 2017, defendant provided its couriers with a "Fleet Agreement" intended to govern the relationship between them. Huey Decl. ¶ 6. Couriers who log into the app for the first time on or after March 1, 2017 were presented with a screen on their smartphones informing them that they will need to agree to the Fleet Agreement before they are allowed to use the app. *Id.* Once couriers click "continue" on that first screen, they are then presented with another screen that shows the first portion of the Fleet Agreement, which includes the following language in bold font:

> IMPORTANT: PLEASE NOTE THAT TO USE THE POSTMATES PLATFORM AS A CONTRACTOR, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE MUTUAL

> ARBITRATION PROVISION SET FORTH BELOW IN SECTION 11 CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH POSTMATES ON AN INDIVIDUAL BASIS, EXCEPT AS OTHERWISE PROVIDED IN SECTION 11, THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE MUTUAL ARBITRATION PROVISION. BY DIGITIALLY [sic] SIGNING THIS AGREEMENT, YOU WILL BE ACKNOWLEDGING THAT YOU HAVE READ AND UNDERSTOOD ALL OF THE TERMS OF THIS AGREEMENT (INCLUDING THE MUTUAL ARBITRATION PROVISION IN SECTION 11) AND HAVE TAKEN TIME TO CONSIDER THE CONSEQUENCES OF THIS IMPORTANT BUSINESS DECISION. IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE MUTUAL ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN SECTION 11 BELOW.

Huey Decl, Ex. D at p. 21. Couriers can take as much time scrolling through and viewing the entirety of the Fleet Agreement from this screen. *Id.* ¶ 6.

Section 11 of the Fleet Agreement is titled "Mutual Arbitration Provision" and provides as follows:

> 11A. Arbitration of Disputes. Postmates and Contractor mutually agree to resolve any disputes between them exclusively through final and binding arbitration instead of filing a

> lawsuit in court. Postmates and Contractor expressly agree that this Mutual Arbitration Provision is governed exclusively by the Federal Arbitration Act (9 U.S.C. §§ 1-16) ("FAA") and shall apply to any and all claims between the Parties, including but not limited to those arising out of or relating to this Agreement, the Contractor's classification as an independent Contractor, Contractor's provision of services under this Agreement, the delivery fees received by Contractor for performing Deliveries, [etc.]... The parties expressly agree that this Agreement shall be governed by the FAA even in the event Contractor and/or Postmates are otherwise exempted from the FAA. Any disputes in this regard shall be resolved exclusively by an arbitrator. In the event, but only in the event, the arbitrator determined the FAA does not apply, the state law governing arbitration agreements in the state in which the Contractor performs services shall apply.

Huey Decl, Ex. D at pp. 27-28. The Fleet Agreement also contains a delegation clause which provides that disputes between the parties relating to the interpretation, applicability, enforceability and formation of the Fleet Agreement are to be exclusively resolved by an arbitrator. *Id.* at p. 28. However, the Fleet Agreement expressly provides that the delegation clause does not apply to the Class Action Waiver and Representative Action Waiver. *Id.* Those waivers state as follows:

> **CLASS ACTION WAIVER—PLEASE READ.** Postmates and Contractor mutually

> agree that any and all disputes or claims between the parties will be resolved in individual arbitration. The Parties further agree that by entering into this Agreement, they waive their right to have any dispute or claim brought, heard or arbitrated as a class and/or collective action, or to participate in any class and/or collective action, and an arbitrator shall not have any authority to hear or arbitrate any class and/or collective action ("Class Action Waiver").
>
> **REPRESENTATIVE ACTION WAIVER—PLEASE READ.** Postmates and Contractor mutually agree that any and all disputes or claims between the parties will be resolved in individual arbitration. The Parties further agree that by entering into this Agreement, they waive their right to have any dispute or claim brought, heard or arbitrated as a representative action, or to participate in any representative action, and an arbitrator shall not have any authority to arbitrate a representative action ("Representative Action Waiver").

Id. at pp. 28-29. The Fleet Agreement provides that disputes regarding the enforceability of the class action and representative action waivers are to be resolved by the court, not an arbitrator. *Id.* at p. 29. Finally, the Fleet Agreement provides that arbitration is not a mandatory condition of contractors' relationship with Postmates, and that contractors may opt out of the Mutual Arbitration Provision within 30 days of signing the Fleet Agreement. *Id.* at p. 30.

Plaintiffs Winns, Logan, and Hickey each clicked a button on their smartphone screens that indicated they accepted the terms of the Fleet Agreement. Huey Decl. ¶¶ 8-10. Plaintiff Alvarado began delivering for Postmates in September 2015, before the Fleet Agreement became effective in 2017. Declaration of Steven Alvarado ("Alvarado Decl.") ¶ 9. Plaintiff Alvarado was not presented with an arbitration agreement at the time he started delivering for Postmates. *Id.* Upon learning of the terms of the Fleet Agreement in February 27,2017, plaintiff Alvarado "opted out" of the Mutual Arbitration Provision by sending an email to Postmates. *Id.* ¶ 12; *see also* Defendant's Supplemental Brief in Support of Motion to Compel Arbitration at p. 5.

Defendant now moves to compel plaintiffs Winns, Logan, and Hickey's claims to arbitration on an individual basis, including their PAGA claims, to strike Plaintiffs Winns, Logan, and Hickey's class claims, and to stay plaintiff Alvarado's individual, putative class, and PAGA penalty claims pending individual arbitration of plaintiffs' Winns, Logan, and Hickey's claims.[2]

---

[2] Defendant initially moved to compel all plaintiffs' claims to arbitration and to stay plaintiffs' PAGA penalty claims. In its Supplemental Brief, defendant modified its position with regard to plaintiff Alvarado on account of his valid "opt-out" notice with respect to the arbitration provision in the 2017 Fleet Agreement. With respect to plaintiff Alvarado, defendant now only asserts that his claims be stayed pending individual arbitration of the other plaintiffs' claims. Defendant also modified its position with regard to plaintiffs Winns, Logan and Hickey's claims for penalties under PAGA, arguing that PAGA penalty claims can be compelled to arbitration in light of the recent United States

II. LEGAL STANDARD

A party seeking to compel arbitration must first prove the existence of an enforceable agreement containing a provision mandating arbitration of the parties' dispute. *See Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 634. State law applies in determining whether there is a valid contract. *Id.* Once the existence of a valid arbitration agreement is established, the "arbitration agreement[] should be liberally interpreted, and arbitration should be ordered unless the agreement clearly does not apply to the dispute in question." *Vianna v. Doctors' Management Co.* (1994) 27 Cal.App.4th 1186, 1189, internal citation omitted. "Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration." *Ibid.*

III. ANALYSIS

As discussed further below, the Court (1) grants the motion to compel arbitration with respect to plaintiffs Winns, Hickey, and Logan's individual claims, including their claims under Labor Code section 558; (2) stays plaintiffs Winns, Hickey, and Logan's class claims pending arbitrator's ruling on applicability of FAA; (3) stays plaintiffs Winns, Hickey, and Logan's claims for penalties under PAGA; (4) denies the motion to compel arbitration with respect to plaintiff Alvarado; and (5) stays plaintiff Alvarado's claim until the Case Management Conference set for October 30, 2018.

Supreme Court decision in *Epic Systems Corp. v. Lewis* ("*Epic Systems*") (2018) 138 S.Ct. 1612.

A. There is a Valid Arbitration Agreement Between Defendant and Plaintiffs Winns, Logan, and Hickey

In California, general principles of contract law determine whether the parties have entered a binding arbitration agreement. *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173. "An essential element of any contract is the consent of the parties, or mutual assent." *Id.* With respect to contracts formed on the internet, a court may find that an individual assented to an electronic agreement if a "reasonably prudent user" would have been put "on inquiry notice" of the terms of the contract. *See Nguyen v. Barnes & Noble Inc.* (9th Cir. 2014) 763 F.3d 1171, 1177. Generally, there are two types of online contracts: "clickwrap" agreements, in which website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use; and "browsewrap" agreements, where a website's terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen. *Id.* at 1175-76. Courts generally uphold clickwrap agreements as valid and enforceable. *Id.* at 1176. Moreover, courts also examine whether the relevant language is sufficiently visible and/or easily accessible, such that a reasonably prudent internet user could learn of the contract term' existence. *See DeVries v. Experian Information Solutions, Inc.* (N.D. Cal. 2017) 16-cv-02953-WHO, 2017 WL 733096, at * 7 (the relevant language's proximity to the "Submit Secure Order" button and font size adequately call a reasonably prudent user's attention to the existence of the Terms and Conditions).

Plaintiffs argue that defendant failed to show that plaintiffs Winns, Logan, and Hickey assented to the arbitration clause in the 2017 Fleet Agreement. Opp. at p. 6. Based on the available authority, however, clickwrap agreements are routinely enforced throughout the country. The Fleet Agreement containing the arbitration provision at issue in this case is a type of clickwrap agreement in that plaintiffs Winns, Logan, and Hickey were required to affirmatively click a box to assent to the terms and conditions of the Fleet Agreement, which included the arbitration provision, in order to use the Postmates app as a "courier" and perform deliveries for Postmates. Defendant presented evidence that plaintiffs Winns, Logan, and Hickey were able to successfully use the Postmates "courier" app and perform deliveries, which is sufficient evidence that these plaintiffs must have clicked the "Agree" button indicating their acceptance of the Fleet Agreement's terms. Huey Decl. ¶¶ 8-10. Plaintiffs have not presented any evidence to the contrary.

Moreover, the terms of the Fleet Agreement, particularly the arbitration provision, was sufficiently conspicuous to potential couriers who were immediately alerted to the existence of the arbitration provision via capitalized text in bold font, preceded by the Word "IMPORTANT," without the need to scroll down. Huey Decl. Ex. C. In addition, because potential couriers were allowed to scroll through the entire Fleet Agreement without the need to click a separate hyperlink, the full terms of the agreement, including the arbitration provision, were made available and easily accessible so that a reasonably prudent user might learn of the arbitration provision's existence. Failing to read the contract is no defense to its enforcement. *Desert Outdoor Advertising v. Sup.*

Ct. (2011) 196 Cal.App.4th 866, 872. Under these circumstances, the Court finds that plaintiffs Winns, Logan, and Hickey assented to the terms of the Fleet Agreement, including the arbitration provision contained therein. Accordingly, the Court concludes that a valid arbitration agreement exists between defendant and plaintiffs Winns, Logan, and Hickey.

B. The Arbitrator Must Decide if the Arbitration Agreement is Enforceable

Plaintiff argues that even if there is a valid arbitration agreement, the arbitration provision in the Fleet Agreement is unconscionable, and therefore not enforceable. As stated above, however, the Fleet Agreement delegated the exclusive authority to resolve any disputes relating to the enforceability of the agreement to an arbitrator. Huey Decl. Ex. D at p. 28. Where, as here, plaintiffs argue that the delegation clause is unconscionable, the Court must determine whether the delegation clause itself may be enforced. *Malone v. Sup. Ct.* (2014) 226 Cal.App.4th 1551, 1560.

Plaintiffs argue that the delegation clause is unconscionable in view of fact that the Fleet Agreement, which contained the arbitration provision here at issue, is a contract of adhesion. "The term contract of adhesion signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Armendariz v. Foundation Health Psychcare Services,* Inc. (2000) 24 Cal.4th 83, 113. The Court finds that the arbitration agreement at issue in this case is not a contract of adhesion because plaintiffs were afforded the opportunity to opt out of

the arbitration clause in the Fleet Agreement within 30 days from accepting the Fleet Agreement's terms. Indeed, Fleet Agreement alerts potential couriers of their right to opt out of the arbitration provision in two ways. The first reference to the right to opt out of the arbitration provision appears in capitalized and bold text on the top portion of the screen containing the full terms of the Fleet Agreement, which is immediately visible to the viewer without the need to scroll down. Huey Decl., Ex. C. The second reference to the opt out provision appears in Section 11B(ix) of the Fleet Agreement, which states clearly in bold text that "[a]rbitration is not a mandatory condition of Contractor's contractual relationship with the Postmates, and therefore Contractor may submit a statement notifying Postmates that Contractor wishes to opt out of this Mutual Arbitration Provision." *Id.*, Ex. D at p. 30. That section also clearly stated that contractors will not be subject to any adverse action as a result of their decision to opt out of the arbitration provision. *Id.* Because the arbitration agreement is not adhesive in nature, it is not unconscionable. Accordingly, the Court finds that the delegation clause is enforceable, and therefore an arbitrator must decide the issue of whether the arbitration provision in the Fleet Agreement is enforceable.

C. The Court Cannot Decide the Enforceability of the Class Action Waiver Until the Arbitrator Decides Whether the FAA Applies to the Arbitration Agreement

Defendant argues that this Court should enforce the class action waiver contained in the Fleet Agreement and strike plaintiffs Winns, Logan, and

Hickey's class claims. Mtn. at pp. 18-19. On the other hand, plaintiffs argue that the FAA does not apply to the arbitration agreement in this case, and that the class action waiver is unenforceable pursuant to the factors set forth in *Gentry v. Sup. Ct.* (2007) 42 Cal.4th 443, 456. Opp. at pp. 7-8. However, the Court finds that whether the class action waiver is enforceable under the FAA or subject to a finding of unconscionability under *Gentry* depends on whether the arbitration agreement is governed by the FAA or California law. *See Muro v. Cornerstone Staffing Solutions, Inc.* (2018) 20 Cal.App.5th 784, 792 (finding *Gentry* governed the issue of whether the class waiver was enforceable after first having concluded that the FAA did not apply). In this case, the parties clearly agreed that any disputes regarding the applicability of the FAA to the arbitration agreement shall be resolved exclusively by an arbitrator. Huey Decl., Ex. D at p. 28. Thus, this Court is precluded from deciding the issue of whether the class action waiver is enforceable until an arbitrator decides whether the FAA applies to the arbitration agreement. Plaintiffs Winns, Logan, and Hickey's class claims are therefore stayed until an arbitrator decides whether the FAA or California law governs the agreement.

D. Plaintiffs Winns, Logan, and Hickey's PAGA Penalty Claims are Stayed Pending Arbitration

Defendant argues in its Supplemental Brief that pursuant to *Epic Systems*, plaintiffs Winns, Logan, and Hickey's claims for civil penalties under PAGA must be compelled to arbitration. Defendant's Supp. Brief at pp. 4, 6. The Court does not find that *Epic Systems* compels plaintiffs to arbitrate their PAGA claims. The U.S. Supreme Court in *Epic*

Systems addressed only the question of whether class or collective action waivers were enforceable under the FAA. The U.S. Supreme Court did not address the enforceability of waivers of representative actions, such as those brought under PAGA. Accordingly, representative action waivers remain unenforceable under *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348.

In any event, *Epic Systems* affirms the rule that arbitration agreements must be enforced according to their terms, which may include terms providing for individualized proceedings. *Epic Systems*, *supra*, 138 S.Ct. at 1619. Here, the parties agreed that "an arbitrator shall not have any authority to arbitrate a representative action." Huey Decl., Ex. D at p. 29. Thus, even if, as defendant argues, *Epic Systems* renders PAGA waivers enforceable, any representative action by plaintiffs still would not be subject to arbitration. For these reasons, and those stated in defendant's moving papers, plaintiffs Winns, Logan and Hickey's claims for civil penalties under PAGA are stayed pending individual arbitration. See Mtn. at pp. 19-20.

E. Plaintiffs Winns, Logan, and Hickey's Claims Under Labor Code Section 558 are Subject to Arbitration

The Court agrees with defendant that pursuant to *Esparza v. KS' Industries, L.P.* (2017) 13 Cal.App.5th 1228, plaintiffs Winns, Logan, and Hickey's PAGA claims for statutory damages under Labor Code section 558 are not subject to the rule of nonarbitrability adopted in *Iskanian*, and are therefore subject to individual arbitration. *Id.* at 1244-46. As the court in *Esparza* explained, because

an award to recover underpaid wages under Labor Code section 558 is paid completely to the affected employee, and not to the state, such claims retain their private nature and continue to be covered by the FAA. *Id.* Even if the arbitrator finds that the FAA does not apply to the arbitration agreement, California law mandates arbitration of plaintiffs Winns, Logan, and Hickey's claim for underpaid wages under Labor Code section 558 based on the plain terms of the arbitration agreement.

Plaintiffs urge the Court to adopt the reasoning and holding in *Lawson v. ZB, NA.* (2017) 18 Cal.App.5th 705, which expressly disagreed with *Esparza*, and held that plaintiff's claims under Labor Code section 558 are outside the scope of the arbitration agreement pursuant to *Iskanian. Lawson*, *supra*, 18 Cal.App.5th at 722-25. However, *Lawson* is no longer binding precedent on account of it having been granted review by the California Supreme Court. *See* Cal. Rules of Court Rule 8.1115. Accordingly, the Court is bound by *Esparza*, and concludes that plaintiffs Winns, Logan, and Hickey's claims under Section 558 are subject to individual arbitration in the event the arbitrator fmds that the arbitration agreement is enforceable.

F. Plaintiff Alvarado's Claims are Stayed Until the Next CMC

Finally, defendant argues in its Supplemental Brief that this Court should stay plaintiff Alvarado's individual, putative class, and PAGA claims pending arbitration of plaintiffs Winns, Logan, and Hickey's claims. The Court will decide this issue at the next CMC scheduled for October 30, 2018. As such, plaintiff Alvarado's claims are stayed until that time.

IV. CONCLUSION

For the foregoing reasons, the Court (1) grants the motion to compel arbitration with respect to plaintiffs Winns, Hickey, and Logan's individual claims, including their claims under Labor Code section 558; (2) stays plaintiffs Winns, Hickey, and Logan's class claims pending arbitrator's ruling on applicability of FAA; (3) stays plaintiffs Winns, Hickey, and Logan's claims for penalties under PAGA; (4) denies the motion to compel arbitration with respect to plaintiff Alvarado; and (5) stays plaintiff Alvarado's claims until the next CMC scheduled for October 30, 2018.

IT IS SO ORDERED.

Dated: September 24, 2018

Mary E. Wiss
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 305

MELANIE ANNE WINNS, RALPH JOHN HICKEY JR., STEVEN ALVARADO and KRISTIE LOGAN, individually, and on behalf of all others similarly situated,
Plaintiffs,

vs.

POSTMATES, INC., a California Corporation, DOES 1-10, individuals, and DOES 11-20, inclusive,
Defendants.

Case No. CGC-17-562282

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, T. Michael Yuen, Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On September 24, 2018, I electronically served the ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT POSTMATES INC.'S MOTION TO COMPEL ARBITRATION AND MOTION FOR STAY via File&ServeXpress® on the recipients designated on the Transaction Receipt located on the File&ServeXpress® website.

Dated: September 24, 2018

T. MICHAEL YUEN, Clerk

By: _____
Sean Kane, Deputy Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

California Labor Code § 2699

(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, 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 pursuant to the procedures specified in Section 2699.3.

(b) For purposes of this part, "person" has the same meaning as defined in Section 18.

(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

(d) For purposes of this part, "cure" means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole. A violation of paragraph (6) or (8) of subdivision (a) of Section 226 shall only be considered cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice sent pursuant to paragraph (1) of subdivision (c) of Section 2699.3.

(e)

(1) For purposes of this part, whenever the Labor and Workforce Development Agency, or

any of its departments, divisions, commissions, boards, agencies, or employees, has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess a civil penalty.

(2) In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars ($500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there shall be no civil penalty.

(g)

(1) Except as provided in paragraph (2), an aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

(2) No action shall be brought under this part for any violation of a posting, notice, agency reporting, or filing requirement of this code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.

(h) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil

penalty on behalf of himself or herself or others or initiates a proceeding pursuant to Section 98.3.

(i) Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.

(j) Civil penalties recovered under paragraph (1) of subdivision (f) shall be distributed to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.

(k) Nothing contained in this part is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions of this code for liability against an employer for the compensation for any injury to or death of an employee arising out of and in the course of employment.

(l)

(1) For cases filed on or after July 1, 2016, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide the Labor and Workforce Development Agency with a file-stamped copy of the complaint that includes the case number assigned by the court.

(2) The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.

(3) A copy of the superior court's judgment in any civil action filed pursuant to this part and any other order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

(4) Items required to be submitted to the Labor and Workforce Development Agency under this subdivision or to the Division of Occupational Safety and Health pursuant to paragraph (4) of subdivision (b) of Section 2699.3, shall be transmitted online through the same system established for the filing of notices and requests under subdivisions (a) and (c) of Section 2699.3.

(m) This section shall not apply to the recovery of administrative and civil penalties in connection with the workers' compensation law as contained in Division 1 (commencing with Section 50) and Division 4 (commencing with Section 3200), including, but not limited to, Sections 129.5 and 132a.

(n) The agency or any of its departments, divisions, commissions, boards, or agencies may promulgate regulations to implement the provisions of this part.

(Amended by Stats. 2016, Ch. 31, Sec. 189. (SB 836) Effective June 27, 2016.)