July 18, 2011 by Betsy Johnson

Employers in California Can Tone Down Their Celebrations about the U.S. Supreme Court Decisions In Wal-Mart and Concepcion

By **Michael Kun**

Understandably, employers have celebrated the U.S. Supreme Court decisions in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ---, --- S.Ct. ---, 180 L. Ed. 2d 374 (2011) and AT&T Mobility v. Concepcion, 563 U.S. ---, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). At the very least, those cases would seem to suggest that the wage-hour class actions and collective actions that have besieged employers might be curtailed significantly, along with the costly settlements triggered by the in terrorem effect of such lawsuits.

California employers can stop celebrating, or at least tone down those celebrations.

Unlike other states, California law provides for a mechanism by which employees can file suit on behalf of other employees without bringing such claims as class actions – the Private Attorneys General Act ("PAGA"). PAGA, often referred to as "The Bounty Hunter Law," generally allows an employee to file suit against an employer on behalf of all "aggrieved employees" for alleged violations of the California Labor Code. The potential recovery in a PAGA claim can be staggering – while the limitations period is only one year, each "aggrieved employee" can recover up to $100 for the first pay period in which a violation occurs, and up to $200 for each subsequent pay period in which a violation occurs. PAGA also provides for the recovery of costs and attorney's fees.

Because claims brought under PAGA are considered representative actions, not class actions, the California Supreme Court has held in Arias v. Superior Court, 46 Cal.4th 969 (2009), that a PAGA plaintiff need not have a class certified to proceed. As such, it is not surprising that plaintiffs in California are already arguing that the tougher class certification standards set forth in Wal-Mart are inapplicable to PAGA claims. Given Arias, it is expected that California courts will agree.

As for Concepcion, which held that arbitration provisions with class action waivers may be enforceable, plaintiff's counsel have already begun arguing that Concepcion is inapplicable to PAGA claims. In Brown v. Ralphs Grocery Co., a California Court of Appeal has agreed with that argument. While that decision may well be challenged before the California Supreme Court, it only underscores how California employees have an avenue to try to avoid the impact of United States Supreme Court decisions regarding class actions – PAGA claims.