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PERSPECTIVE

## Did *Timbs* set up constitutionality problems for PAGA?

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“[T]he protection against excessive fines guards against government’s punitive or criminal-law-enforcement authority. This safeguard, we hold, is fundamental to our scheme of ordered liberty, with deep roots in our history and tradition.” (Justice Ruth Bader Ginsburg writing for the unanimous Supreme Court in *Timbs v. Indiana*, 2019 DJ-DAR 1337) With these words, do California employers now have an arrow in their quiver to challenge the constitutionality of California’s Private Attorneys General Act?

They just might.

**But wait, isn’t *Timbs* about civil asset forfeitures?** In *Timbs*, the police seized the petitioner’s car during his drug arrest. After petitioner’s guilty plea, the state of Indiana sought civil forfeiture of his car, claiming it had been used in the crime. The trial court and appellate court denied the state’s request, holding that the forfeiture would constitute an excessive fine under the Eighth Amendment because the value of the car (\$42,000) was more than four times the maximum fine under the criminal statute (\$10,000). The Indiana Supreme Court reversed, finding that the excessive fines clause does not apply to the States.

In a unanimous decision, the U.S. Supreme Court reversed. In doing so, the court held that the Eighth Amendment’s protection against “excessive fines” is incorporated by the due process clause of the Fourteenth Amendment, and thereby applicable to the States. Although *Timbs* arose in the context of civil asset forfeitures, the court’s holding was not so narrowly constrained. Now, under *Timbs*, other state revenue-raising penalty schemes are subject to Eighth Amendment scrutiny because “exorbitant tolls undermine other constitutional liberties.”

**PAGA is just the kind of revenue-raising scheme that offends the Eighth Amendment.** Justice Ginsburg highlights one of the key dangers of state-imposed fines: “Even absent a political motive, fines may be employed in a measure out of accord with the penal goals of retribution and deterrence, for fines are a source of revenue, while other forms of punishment cost a State money.”

Through PAGA, the state of California turned the Labor Code’s civil penalty structure into a revenue-raising

scheme by deputizing individuals (“aggrieved employees”) to become civil penalty collectors on behalf of the state. The “aggrieved employees” share in 25 percent of the civil penalties but the remaining 75 percent goes directly to the state’s coffers. For any Labor Code provision that did not already have a civil penalty attached to it, PAGA created a flat penalty of \$100 (\$200 for subsequent violations) per pay period. Via PAGA, the state has been able to collect millions of dollars in revenue without paying a single penny of its own. Instead, the employer is required to pay the attorney fees of counsel pursuing the PAGA claim on behalf of the “aggrieved employees.” This consequence-free state revenue-generating scheme is exactly what *Timbs* warns against.

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**But what about the PAGA penalties?** By adding a PAGA claim, the employee will seek to turn a \$0.20 underpayment into a more than \$300 issue. The employee will argue that the employer owes a separate PAGA penalty for failing to: (1) include the incentive payment in the overtime calculation; (2) list the correct overtime pay rate on the wage statement; and (3) pay all wages (including the missing \$0.20) within seven days of the close of the pay period. Under this theory, the employee will claim at least \$300 in PAGA penalties for the \$0.20 mistake, or 1,500 times the actual harm.

While \$300 may not seem like a lot, multiply it by 52 weekly pay periods. The \$10.40 mistake (\$0.20 x 52 weeks) quickly morphs into a demand of over \$30,000 (\$300 for the first pay period, and \$600 for every subsequent pay period) in PAGA penalties.

But it won’t stop there. Employee’s counsel will seek the same PAGA penalties on behalf of the other 24 employees and will threaten that if litigation is successful, the retailer may face an award of at least \$700,000 in pen-

alties and several hundreds of thousands of dollars in attorney fees. How did a 20-cent mistake turn into a \$1 million problem? That four-letter word California employers’ dread: PAGA!

Sure, under PAGA the judge may award a lesser amount than the maximum civil penalty if, to do otherwise, would result in an award that is “unjust, arbitrary and oppressive, or confiscatory.” But for the vast majority of employers, PAGA’s discretionary language provides little practical comfort because it assumes that the employer has the means and wherewithal to take a case through trial. Very few do.

***Timbs* offers employers a beacon of hope.** Last November, the California Business and Industrial Alliance sued California’s attorney general in Orange County Superior Court arguing that PAGA is unconstitutional, by, among other things, violating the Eighth Amendment. *Timbs* provides invaluable support for that argument and will hopefully mark the end of the PAGA gravy train.

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