

Labor and Employment Alert

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California Supreme Court Upholds Class Waivers In Employee Arbitration Agreements, But Not Waivers Of Representative Claims Under California's Private Attorneys General Act

Yesterday, the California Supreme Court, in *Iskanian v. CLS Transportation Los Angeles, LLC* (Case No. S204032), upheld a class action waiver in an arbitration agreement between an employee and his employer. The Supreme Court recognized that its earlier contrary decision (*Gentry v. Superior Court* (2007) 42 Cal. 4th 443) has been abrogated by recent United States Supreme Court precedent. Specifically, the state court recognized that, under *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740, the Federal Arbitration Act ("FAA") preempts California's *Gentry* rule against class waivers. The California Supreme Court also rejected the employee's arguments that the class waiver provision was unenforceable under the National Labor Relations Act and that the employer had waived its right to enforce the arbitration agreement.

However, the California Supreme Court determined that where an arbitration agreement requires the waiver of representative actions under California's Private Attorneys General Act ("PAGA")—a California Labor Code provision that authorizes an employee to bring an action for civil penalties on behalf of the state against the employer for Labor Code violations, with most of the proceeds of that litigation going to the state—that waiver is contrary to California public policy and unenforceable as a matter of state law.

The California Supreme Court further held that California's rule against PAGA waivers does not frustrate the objectives of the FAA, and, thus, is not preempted. The court reasoned that a PAGA claim lies outside the coverage of the FAA because it is not a dispute between an employer and an employee arising out of their contractual relationship, but is instead a dispute between the employer and the state—as the employee enforces the state's interests in penalizing and deterring employers who violate California's labor laws and the majority of any civil penalties recovered in PAGA actions go to the state.

Iskanian thus held that the employer could not compel the waiver of the employee's representative PAGA claims, but that the arbitration agreement was otherwise enforceable. Even though the employee was limited to pursuing only individual claims in arbitration, the employer would also have to defend against the representative PAGA claim (but the California Supreme Court left the court on remand to decide whether the PAGA claim would proceed in arbitration or litigation).

The clear impact of *Iskanian* is that while it upholds the enforceability of employer arbitration agreements, it nonetheless frustrates employer efforts to avoid class litigation by adopting or enforcing an arbitration program. While PAGA claims generally are less attractive to plaintiffs than class claims (because of the shorter limitations period and the fact that the overwhelming majority of the recovery goes to the state), the penalties still can be substantial, so plaintiffs have an incentive to pursue them, even if class claims are not possible.

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