

## Labor and Employment Alert

October 2, 2015

### If you read one thing...

- With 9th Circuit ruling, California federal courts no longer a potential channel for employers to enforce representative action waivers for PAGA claims



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### 9th Circuit Rejects Representative Action Waivers for PAGA Claims

This week, the 9th Circuit **held** in *Sakkab v. Luxottica Retail North America, Inc.* that class or representative action waivers in arbitration agreements are not enforceable with respect to claims brought under California's Private Attorneys General Act (PAGA). Although the California Supreme Court had already decided in 2014 in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), that representative action waivers could not be enforced in connection with PAGA claims, a number of district courts in California refused to follow *Iskanian* and continued to enforce such waivers for PAGA claims based on their determination that the Federal Arbitration Act (FAA) preempted any state rule against their enforceability. *Sakkab* holds that the *Iskanian* rule is not preempted by the FAA.

In *Sakkab*, a former employee of an eyewear retailer alleged that he had been misclassified as exempt, and asserted California Labor Code claims for unpaid overtime compensation, failure to provide accurate itemized wage statements and failure to timely pay wages when due. The plaintiff also asserted a claim for civil penalties under PAGA. PAGA allows an aggrieved employee to step into the shoes of the state to seek penalties for Labor Code violations on his or her own behalf as well as on behalf of other aggrieved employees in a representative capacity. Seventy-five percent of penalties recovered go to the state.

The 9th Circuit agreed with *Iskanian*, holding that a waiver of the right to bring a representative PAGA action was unenforceable. This is because PAGA provides for penalties for all employees aggrieved by a Labor Code violation and, according to the 9th Circuit, waiving the representative element of PAGA would result in different penalties from what the statute contemplates. It would also fail to adequately punish or deter employers from violating the Labor Code because the penalties applicable to a single employee will generally be substantially less than for all aggrieved employees. The 9th Circuit likewise held that the *Iskanian* rule did not interfere with the primary purposes of the FAA, which are to prevent judicial hostility to arbitration and to enforce arbitration agreements according to their terms, because (1) PAGA claims

could still be arbitrated on a representative basis; and (2) the parties in arbitration can decide how a PAGA claim would be tried, thus preserving the benefit of streamlined proceedings in arbitration.

*Sakkab* is significant because employers facing representative PAGA claims in federal court previously had a chance of enforcing representative action waivers, even though that was not an option in state court after *Iskanian*. Now, unless and until the U.S. Supreme Court takes up the issue and decides otherwise, employers will not be able to enforce representative action waivers for PAGA claims, regardless of forum. Notably, however, this does not impact class or representative action waivers for non-PAGA claims, which remain enforceable under both state and federal authority.

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