

# California LAWYER

MONDAY, MAY 21, 2018

## State high court is poised to resolve a split under *Iskanian*

By Gregory W. Knopp and Jonathan P. Slowik

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), the California Supreme Court held that arbitration agreements purporting to waive representative claims for civil penalties under the Private Attorneys General Act may not be enforced. However, *Iskanian* left open the question of whether PAGA claims may be compelled to individual arbitration to the extent they seek relief *other than* civil penalties to be paid largely to state coffers.

In *Iskanian*, the court carefully distinguished between “[t]he civil penalties recovered on behalf of the state under the PAGA,” and “the statutory damages to which employees may be entitled in their individual capacities,” explaining that its rule was necessary to protect “the state’s interest in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations.” Some Labor Code provisions, like Section 558(a)(3), permit PAGA plaintiffs to recover unpaid wages to be paid entirely to the affected employees.

In recent months, the Court of Appeal has issued two conflicting decisions regarding whether the *Iskanian* rule extends to such claims: *Esparza v. KS Indus., L.P.*, 13 Cal. App. 5th 1228 (2017) (holding that PAGA claims for unpaid wages can be compelled to individual arbitration), and *Lawson v. ZB, N.A.*, 18 Cal. App. 5th 705 (2017) (holding that such claims cannot be compelled to individual arbitration).

The California Supreme Court accepted review of *Lawson* in March to resolve the split.

Quoting *Iskanian*, *Esparza* explained that “[t]he rule of nonarbitrability adopted in *Iskanian* is limited to claims ‘that can *only* be brought by the state or its representatives, where any resulting judgment is binding on the state and any monetary penalties largely go to state coffers,’” “These limitations are not met by ... claims for unpaid wages owed to other aggrieved employees.” Rather, a claim for unpaid wages — regardless of the statute used to recover them — “is a private dispute because ... it could be pursued by [the] Employee in his own right.” “To hold otherwise would allow a rule of state law to erode or restrict the scope of the Federal Arbitration Act — a result that cannot withstand scrutiny under federal preemption doctrine.”

*Lawson* disagreed. Observing that only the state (or a PAGA plaintiff as its proxy) can seek recovery under Section 558, the Court of Appeal held that claims for unpaid wages under that section could not be compelled to individual arbitration: “*Iskanian* made it clear that the distinction between civil penalties and victim specific statutory damages hinges in large measure on whether ... they could only be recovered by way of regulatory enforcement or whether they supported a private right of action.” *Lawson* found further support for this conclusion in *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112 (2012), which held that the unpaid wages available under Section

558 as part of the “civil penalty” recoverable by the state.

*Esparza* arguably is more consistent with *Iskanian*, for two reasons. First, a PAGA plaintiff seeking unpaid wages under Section 558 is not pursuing a remedy exclusive to the state — other provisions of law obviously provide a private right of action to recover unpaid wages. Second, relying on *Thurman*’s characterization of Section 558 wages as a “civil penalty” arguably elevates semantics over substance. *Iskanian* made clear that its rule does not extend to claims where the state “deputiz[es] employee A to bring a suit for the individual damages of employees B, C, and D,” and that is precisely what occurs where a private citizen asserts a PAGA claim for unpaid wages.

Notably, the only other cases on point thus far have followed *Esparza*. See *Mandviwala v. Five Star Quality Care, Inc.*, 16-55084 (9th Cir. 2018), (*Esparza* “is more consistent with *Iskanian* and reduces the likelihood that *Iskanian* will create FAA preemption issues”); *Cabrera v. CVS Rx Servs., Inc.*, C 17-05803 WHA (N.D. Cal. Mar. 16, 2018) (same).

Although it is always difficult to predict what the California Supreme Court will do, for good reason, there is growing momentum for the *Esparza* position.

**Gregory W. Knopp** is a partner and **Jonathan P. Slowik** counsel at Akin Gump in Los Angeles, where they focus on employment litigation and counseling.