Client Alert

This Client Alert discusses a California Supreme Court decision dealing with a major employment litigation issue.

CA Supreme Court Firmly Upholds Enforceability of Class Action Waivers, Except For PAGA Representative Claims

In the much anticipated decision of *Iskanian v. CLS Transportation Los Angeles, LLC*, the California Supreme Court brought finality to one of the more widely contested issues in California courts today -- whether an arbitration agreement in an employment agreement may waive the right of the employees to bring class and representative actions against their employers. Employers and employees may agree to waive class actions, but they may not agree to waive certain representative actions.

Specifically, the *Iskanian* Court unambiguously held that: (1) the state's refusal to enforce a waiver of class actions on grounds of public policy is preempted by the Federal Arbitration Act ("FAA"); (2) such waivers are not made unenforceable by the National Labor Relations Act ("NLRA"); (3) however, such waivers cannot bar employees from bringing "representative" actions under Labor Code Private Attorneys General Act of 2004 ("PAGA"), which allows employees to bring representative claims to enforce the Labor Codes where a significant portion of the compensatory award goes to the State.

Iskanian was a driver for CLS who signed an arbitration agreement as part of his employment, which waived both class and representative actions. In 2006, and after leaving the company, he filed wage and hour claims, both as a class action and a representative action under PAGA. While pending, his case was buffeted by a whirlwind of high-profile arbitration decisions.

First, in 2011, the United States Supreme Court decided the landmark case of *AT&T Mobility, LLC v. Concepcion*, which held that state courts could not categorically invalidate waivers of class actions and class arbitrations, finding that such decisions were preempted by the FAA.

This was at odds with the California Supreme Court's 2007 *Gentry* decision. *Gentry* held that plaintiffs could show that class action waivers violated public policy because they deprived plaintiffs of a more effective means of vindicating their rights than individual litigation, particularly in instances where any individual recovery would be small. The *Iskanian* Court found that its *Gentry* decision has been abrogated by *Conception*. Even though it may be practically difficult for plaintiffs

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with small claims to find attorneys to bring their individual claims, that is not a bar to enforcement of the arbitration agreement waiving class actions.

Second, another obstacle to the enforcement of arbitration agreements was the 2012 decision by the National Labor Relations Board ("NLRB") in *D.R. Horton*, in which the NLRB held that the NLRA prohibited agreements that compel employees to waive their right to participate in class proceedings (that is, "concerted activity"). The *Iskanian* Court held, in part, that because the NLRA was created before the advent of modern arbitration, the NLRA was not in conflict with the more recent FAA, which strongly favors the enforcement of arbitration.

In crafting arbitration agreements, however, employers must still take care to ensure that the language does not, as the *Iskanian* Court observed, "lead employees to reasonably believe they were prohibited from filing unfair labor practice charges with the [NLRB]." The *Iskanian* Court found the employer's class action waiver permissible because it "still permits a broad range of collective activity to vindicate wage claims." Specifically, the Court observed that the employer's arbitration agreement did not: (1) prohibit employees from filing joint claims in arbitration; (2) preclude the arbitrator from consolidating the claims of multiple employees; (3) prohibit the arbitrator from awarding relief to a group of employees; or (4) restrict the capacity of employees to discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims. The Court held that it had no occasion to decide whether an arbitration agreement that "more broadly restricts collective activity would run afoul of" the NLRA.

Finally, the trial court had granted the employer's motion to compel arbitration, and the Court of Appeal affirmed, including holding that the arbitration provision waived the PAGA claims -- one of the few Court of Appeal decisions to do so in the wake of *Concepcion*. As to this point, the California Supreme Court overruled the Court of Appeal and held that the arbitration provision cannot bar representative PAGA claims because they are more akin to an action between the State and the employer, the employee has essentially been deputized to bring the claim on behalf of the State (of any penalties recovered, the State gets 75%, and the employees get 25%), and any judgment is binding on the State.

The decision leaves open the questions whether, in a case such as this, the parties would agree on a single forum for the PAGA claims and individual claims, or separate the claims, with the PAGA claims going to litigation and the other claims going to arbitration. If the parties choose the second route, the further issue is left open whether the arbitration would be stayed pending resolution of the PAGA claims. The case is remanded to the Court of Appeal to clarify these issues.

In sum, the ambiguity around the enforceability of class action waivers in employment arbitration agreements has been cleared up -- they are enforceable. However, the ambiguity around how employers and employees will procedurally resolve individual claims in arbitration and PAGA claims in litigation will likely foster further rounds of decisions.

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