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Employment Law Alert

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New Case Says PAGA Actions Not Barred By Class Action Waivers

In 2011, the U.S. Supreme Court handed down *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, upholding arbitration agreements in consumer contracts pursuant to which consumers waived the right to bring class-wide proceedings. Since then, California courts have debated the application of *Concepcion* in the employment context, including whether a class action waiver in an employment arbitration agreement can override an employee's right to bring representative claims under California's Private Attorneys General Act (PAGA). In a case decided last week, *Brown v. Superior Court of Santa Clara County (Morgan Tire & Auto, LLC)* (June 4, 2013) Case No. H037271, a California Court of Appeal declined to extend *Concepcion* to PAGA representative claims and declined to enforce an employment arbitration agreement that purported to waive an employee's right to bring a PAGA representative action in court.

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Employees of Morgan Tire & Auto (doing business as Wheel Works) signed an Employee Dispute Resolution Plan (EDRP). The EDRP provided that employment-related disputes would be submitted to mediation and arbitration and that employees waived any rights bring or participate in disputes brought in any court on as a class, collective, or representative action.

In July 2010, the employees-plaintiffs filed a putative class action against Morgan Tire & Auto alleging violations of California wage and hour laws. They also asserted causes of action under the Unfair Competition Law and for civil penalties on behalf of themselves and all other aggrieved employees under PAGA.

At the time the suit was filed, arbitration agreements containing class action waivers were unenforceable in California in virtually all consumer and wage and hour cases, pursuant to the California Supreme Court's decisions in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (consumer) and *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (wage and hour). As a result, Morgan Tire & Auto did not raise arbitration as an affirmative defense in its answer and proceeded to engage in discovery relating to the putative class members.

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But on April 27, 2011, the U.S. Supreme Court handed down its ruling in *Concepcion,* explicitly overruling *Discover Bank* on the grounds that the Federal Arbitration Act (FAA) requires that arbitration agreements be enforced according to their terms. Morgan Tire & Auto immediately filed a motion to compel individual arbitration, arguing that *Concepcion* impliedly overruled *Gentry* and, therefore, required enforcement of the class/representative action waiver with respect to the plaintiffs' wage and hour claims, including the PAGA representative claims. Plaintiffs opposed the motion, arguing that *Concepcion* did not address *Gentry* and that, in any event, Morgan Tire & Auto waived its right to arbitrate. The superior court granted the motion to compel individual arbitration.

Now, the California Court of Appeal, Sixth Appellate District, has reversed, concluding that *Concepcion* does not go so far as to permit arbitration agreements to override the statutory right to bring representative claims under PAGA. The Court reasoned that a plaintiff who sues for PAGA civil penalties "is suing as a proxy" for the state's labor law enforcement agencies, and that PAGA has a public purpose of supplementing enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. The Court of Appeal went on to explain that while a class action waiver may be enforced as to statutes that provide a private remedy, neither *Concepcion* nor any other U.S. Supreme Court case "has held that the FAA requires enforcement of a private agreement that wholly prevents the exercise of a statutory right intended for a predominantly public purpose."

Thus, the Court of Appeal concluded that the EDRP signed by the Morgan Tire & Auto employee-plaintiffs was unenforceable to the extent that it prevented them from pursuing PAGA civil penalties in court on a representative basis.

Employers should note that California courts have issued conflicting decisions on the impact of *Concepcion* on PAGA representative claims. Indeed, the issues considered in *Morgan Tire & Auto* are now pending before the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles* (2nd Dist. Div. 2), review granted Sept. 19, 2012, S204032, in which the Second Appellate District held that *Concepcion* applies to a representative action under PAGA. The questions presented in *Iskanian* are:

> "(1) Did [Concepcion] impliedly overrule [Gentry] with respect to contractual class action waivers in the context of non-waivable labor law rights? (2) Does the high court's decision permit arbitration agreements to override the statutory right to

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> bring representative claims under the [PAGA]? (3) Did defendant waive its right to compel arbitration?"

Until these questions are resolved, plaintiffs' attorneys will likely use *Morgan Tire & Auto* – and PAGA representative actions -- as a way around limits placed by *Concepcion* on employment cases in the context of a valid class and representative action waiver. Thus, employers may, at least temporarily, see a surge in representative actions under PAGA even where the employer has an otherwise valid mandatory arbitration agreement that includes a class and representative action waiver.

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