

June 25, 2014

California Supreme Court Upholds Class Action Waivers In Arbitration Agreements But Exempts PAGA Representative Actions

On June 23, 2014, the California Supreme Court issued its much-anticipated decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, Case No. S204032, holding (i) the Federal Arbitration Act (FAA) preempts the *Discover Bank* rule, which restricted enforcement of arbitration agreements containing a waiver of class action proceedings, but (ii) FAA preemption did not extend to representative claims under California's Private Attorneys General Act of 2004 (PAGA). Thus, while *Iskanian* broadly permits enforcement of a class action waiver in an arbitration agreement, it also will motivate plaintiffs' attorneys to routinely add PAGA claims to wage and hour complaints in the hope of limiting the effect of an arbitration provision that bars class claims.

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In *Iskanian*, the employee sought to bring a class action lawsuit based on his employer's alleged failure to compensate its employees for, among other things, overtime and meal and rest periods. The employee had entered into an arbitration agreement that waived the right to class and representative proceedings. The Court determined that a California rule restricting enforcement of employment class action waivers on grounds of public policy or unconscionability was preempted by the FAA. In doing so, the Court affirmed the holding of the Court of Appeal that the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* invalidated the California Supreme Court's decision in *Gentry v. Superior Court*, which had previously held such waivers to be unenforceable under certain circumstances. The Court also held that the class waiver at issue was not unlawful under the National Labor Relations Act.

The Court carved out an exception, however, for PAGA claims. After deciding that an employee's right to bring a PAGA action is unwaivable under California law, the Court went on to hold that the FAA does not preempt California's prohibition of waiver of PAGA representative actions in an employment contract. The Court explained that "the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf." Having concluded that the employee's PAGA waiver was unenforceable, the Court next observed that although the employee must arbitrate his individual claims,

the employer must "answer" the PAGA claims in some forum. Consequently, the Court stated that unless the parties agreed to a single forum for resolution of all claims, on remand the trial court would have to decide whether to bifurcate the individual claims from the PAGA claims and then decide which set of claims would be resolved first. California law, not the FAA, governs these remaining issues.

Iskanian represents a significant development for employers, who may now clearly require their employees to waive the right to bring class action lawsuits. Employers will be unable to require their employees to forgo representative actions under PAGA, however, barring a contrary ruling by the U.S. Supreme Court.

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