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Retailers Beware: The California Divide on PAGA Waivers May Impact the Road to Arbitration

By Amy Messigian

Yesterday, the California Court of Appeal ruled against The Wet Seal Retail, Inc. in its appeal of the denial of its motion to compel arbitration. The trial court determined that the arbitration agreement at issue impermissibly waived representative actions under the Private Attorney General Act (PAGA). Because the agreement also stated that it was not to be enforced if the waiver provision was found unconscionable, the court denied the motion to compel arbitration. On appeal, the decision was affirmed. This case highlights the current divide between state and federal courts in California on the enforcement of representative action waivers and the need for the US Supreme Court to accept certiorari of *Iskanian v. CLS Transp. Los Angeles, LLC*. (See our prior blog post on *Iskanian* here.)

In 2011, the US Supreme Court in *AT&T Mobility v. Concepcion* ruled that class actions may be waived through arbitration agreements. Last year, the California Supreme Court followed suit in *Iskanian*. However, the California Supreme Court gave with one hand and took with another, also finding that the statutory right to bring representative claims under PAGA may not be waived by an arbitration agreement. Because PAGA claims are typically included in wage and hour litigation, employers were faced with the conundrum of crafting agreements in which PAGA claims are bifurcated or permitting PAGA representative claims to be heard in arbitration. Although a petition for writ of certiorari with the US Supreme Court has been filed in *Iskanian*, until the Court accepts the petition and rules, or denies the petition and lets the California holding stand, employers will remain uncertain as to how to address PAGA claims in arbitration agreements.

In the meantime, *Iskanian* has created a divide between state and federal courts in California on the issue of PAGA waivers. *Montano v. The Wet Seal Retail, Inc*. is among the California state court cases adopting the holding in *Iskanian*. Meanwhile, five federal district courts have all found PAGA waivers enforceable: *Ortiz v. Hobby Lobby Stores, Inc.; Chico v. Hilton Worldwide, Inc.; Langston v. 20/20 Companies, Inc.; Mill v. Kmart Corp.; and Fardig v. Hobby Lobby Stores, Inc*. The line in the sand has been drawn and employers should expect that the choice of forum in which their motion to compel arbitration is heard will largely decide whether a PAGA waiver will be found enforceable for the time being.

The *Wet Seal* case serves as a cautionary tale to retailers whose arbitration agreements call for the court to nullify the agreement if the class/collective action waiver is found to be unenforceable. Had the agreement permitted the court to enforce the remainder of the agreement, Wet Seal may have been able to compel the individual claims into arbitration and bifurcate the PAGA representative claims, as the court suggested in *Iskanian*. Thus, employers who wish to proceed with individual claims in arbitration should consider including either a PAGA waiver with instructions to enforce the remainder of the agreement even if the

PAGA waiver is found unenforceable or language that carves out representative claims that may not be waived as a matter of law. Because the law remains in flux, this is a particularly good time to assess risks under currently operative arbitration agreements and adjust agreements accordingly.

Tags: California, California Court of Appeal, PAGA, Private Attorney General Act

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