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California Supreme Court Opens the Door to Class Action Waivers, Shuts Door to Waiver of Representative Actions

By Marisa S. Ratinoff and Amy B. Messigian

One of the main battlegrounds between employers and employees relates to the ability of employers to preclude class actions by way of arbitration agreements containing class action waivers. In California, the seminal case of *Gentry v. Superior Court* ("*Gentry*") has had the practical effect of invalidating class action waivers in employment arbitration agreements since 2007. *Gentry* held that an employment class action waiver was unenforceable as a matter of California public policy if the class action waiver would "undermine the vindication of the employees' unwaivable statutory rights" under the Labor Code. Thus, California retailers and national retailers with a business presence in California have found it extremely difficult, if not impossible, to enforce class action waivers in their employment arbitration agreements over the past seven years and have seen scores of California wage and hour cases proceed in court under the harsh hand of *Gentry*.

The landscape changed drastically in 2010 when the United States Supreme Court issued its decision in *AT&T Mobility, LLC v. Concepcion* ("*Concepcion*"). There, the Supreme Court held that the Federal Arbitration Act ("FAA") preempts state laws or policies that deem arbitration agreements unconscionable and unenforceable on the basis that they preclude class actions. While the *Concepcion* case related to a consumer arbitration agreement, many have questioned whether its impact extended to employment arbitration agreements, such as the ones invalidated on public policy grounds under *Gentry*.

Iskanian v. CLS Transportation Los Angeles, LLC is the first case to test this issue before the California Supreme Court. The decision takes one step forward and one step back. First, the Court held that *Gentry* has been abrogated by *Concepcion*. As such, courts may not refuse to enforce an employment arbitration agreement simply because it contains a class action waiver. The Court further rejected the argument that a class action waiver is unlawful under the National Labor Relations Act.

However, the Court also found that an employee's right to bring a representative action under Private Attorney

General Act ("PAGA") is nonwaivable. Under PAGA, an employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. Of the civil penalties recovered, 75 percent goes to the State of California and the remaining 25 percent go to the "aggrieved employees." The Court held that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy." The Court also found that "the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude [California's] Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf." The Court explained that PAGA waivers do not frustrate the FAA's objectives because the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the State, which is being brought in a representative capacity by the employee. Because the State derives the majority of the benefit of the claim and any judgment is binding on the government, it is the "real party in interest," making a PAGA claim more akin to a law enforcement action than a private dispute. Because of this, it is within California's police powers to enact PAGA and prevent the waiver of representative PAGA claims.

The practical effect is that even if a class action waiver is enforceable, any purported waiver of a representative PAGA action will be unenforceable. As a result, a complaint filed in court that includes a PAGA cause of action will arguably remain with the court unless the claims are bifurcated. As for *Iskanian* and his former employer, the Court left these questions to the parties to resolve. While it is possible that *Iskanian* will be appealed to the United States Supreme Court for guidance, at least for the foreseeable future employers should expect plaintiffs' counsel to include PAGA causes of action in order to frustrate employer efforts to move wage and hour claims to arbitration.

Going forward, retail employers may want to consider adopting agreements with their California employees that expressly permit representative PAGA claims to be brought in arbitration while waiving all other class claims to the extent allowed by law. Alternatively, employers may revise their agreements to allow for bifurcation of claims or expressly exclude PAGA claims from the scope of the agreement. In either case, employers should use this opportunity to review the terms of their arbitration agreements and put new agreements in place with California employees, if necessary.

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Epstein Becker & Green, P.C.
250 Park Avenue • New York, New York 10177 • Phone: 212.351.4500