



PAGA Waivers Unenforceable in California Courts

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The United States Supreme Court recently declined to review the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*. In *Iskanian*, the California Supreme Court held that the Federal Arbitration Act (FAA) preempted California's policy against enforcement of class action waivers in arbitration agreements. This means that class action waivers in employment arbitration agreements are generally enforceable.

However, the California Supreme Court also held that representative claims under the Private Attorneys General Act (PAGA) (an act which essentially deputized private citizens to seek penalties on behalf of California's Labor and Workforce Development Agency and split any penalties recovered – 75% to the state and 25% to the employees) could not be waived in arbitration agreements. The net effect of this holding is that any employment agreement that compels the waiver of representative claims under the PAGA is contrary to public policy and unenforceable as a matter of state law. The California Supreme Court reasoned that the point of the PAGA was to expand California's limited enforcement authority and that any agreement waiving a worker's right to bring a PAGA action serves to disable one of the primary mechanisms for enforcing California's Labor Code.

Notwithstanding, several California federal district court judges have rejected the *Iskanian* holding that workers cannot waive representative PAGA claims through arbitration agreements. Thus, there is a split between state and federal courts in California. The federal district courts disagree with *Iskanian* on the basis that (a) it is inconsistent with the United States Supreme Court decision in *AT&T Mobility v. Concepcion* which held that the FAA preempts any state laws that invalidate class action waivers and (b) the FAA preempts California's rule prohibiting representative PAGA waivers because that rule treats arbitration agreements unfavorably. The split between state and federal courts in California means that employees will want to litigate PAGA claims in state court and employers will want to proceed in federal court.

The *Iskanian* decision will most likely increase the number of PAGA claim filings and efforts to remove them to federal court. The continuation of conflicting decisions by California state and federal courts may trigger another opportunity for the United States Supreme Court to address this issue. In the meantime, *Iskanian* raises a host of procedural and strategic issues which will need to be addressed by employment counsel as PAGA claims proceed.

Notwithstanding, the uncertainty over the enforceability of representative class action waivers, employers should consider well-drafted arbitration agreements as an important tool for limiting and preventing class action employment litigation.