



CBA Legal Notes

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Decision Restores Arbitration Class Action Waiver in Employment Agreements

The California Supreme Court issued an opinion in *Iskanian v. CLS Transportation Los Angeles, LLC* making class action waivers in employee arbitration agreements enforceable. In 2007 the Court had decided *Gentry v. Superior Court (Circuit City)* (2007) 42 Cal.4th 443, which invalidated class arbitration waivers in employment agreements because they undermine employees' statutory rights as well as enforcement of state overtime laws. Under *Gentry*, class arbitration waivers would not be enforced if "class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration."

The continued viability of *Gentry* has been questioned since the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. _____. *Concepcion* invalidated the California Supreme Court's decision in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, which also addressed the enforceability of class arbitration waivers in the context of consumer contracts. In *Concepcion*, the U.S. Supreme Court held that classwide arbitration frustrates the principal goals of arbitration and is thus inconsistent with the Federal Arbitration Act. It sacrifices the main advantage of arbitration, which is its informality, making the process slower, more costly, and less effective in producing final judgments.

While *Discover Bank* addressed the doctrine of unconscionability and *Gentry* whether class action waivers undermine the vindication of

employees' labor law rights, California Associate Justice Liu, writing for the majority in *Iskanian*, reasoned that the distinctions between the two cases do not change the fact that a class action procedure interferes with the fundamental attributes of arbitration. Therefore, the Court overruled its *Gentry* decision.

The Court rejected Plaintiff *Iskanian's* argument that the class action waiver is invalid under the National Labor Relations Act (NLRA), which generally prohibits contracts that compel employees to waive their right to participate in class proceedings to resolve wage claims. In *D.R. Horton, Inc. v. NLRB* (5th Cir. 2013) 737 F.3d 344, the federal Fifth Circuit acknowledged that filing a civil action together with other employees is a protected concerted activity within the meaning of the NLRA. However, the court noted that the FAA "has equal importance." Neither the NLRA's language nor its legislative history indicated a prohibition of class arbitration waivers. Nor is there an inherent conflict between the FAA and the NLRA. Finding the Fifth Circuit Court's analysis persuasive, the *Iskanian* court concluded that the NLRA does not override the FAA's liberal policy favoring arbitration.

The Court also held that a class action waiver would not be enforceable to bar employees from bringing representative actions under the state Private Attorneys General Act ("PAGA," codified at Labor Code Section 2968 *et seq.*). Under PAGA, an employee may bring an action personally and on behalf of other employees to

recover civil penalties for Labor Code violations. (Lab. Code, § 2699(a)). The Legislature intended through PAGA to help fill the gap in government enforcement of labor code violations left by chronic shortages in enforcement resources compared to the size of the labor market. Seventy-five percent of any civil penalties recovered is paid to the Labor and Workforce Development Agency, and the remaining 25% to the plaintiffs.

The Court held that the FAA does not govern arbitration of claims of government agencies whether a claim is brought by a proxy or an agency itself. The purpose of the PAGA is to vindicate the Labor and Workforce Development Agency's interest in enforcing the Labor Code, and a PAGA action may not be waived. Not allowing a waiver does not interfere with the FAA's goal of promoting arbitration as a forum for private dispute resolution. Therefore the Court

concluded that "where...an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as a matter of state law."

Under this decision, California employers now have more options and a little more certainty about the enforceability of their arbitration agreements and their ability to avoid class actions. An appeal to the U. S. Supreme Court is possible.

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