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Client Alert

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California Supreme Court Rules that Employers Are Entitled to Include Class Action Waivers in Arbitration Agreements

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In a welcome development for California businesses, the California Supreme Court issued a favorable ruling on June 23, 2014, holding that California law permits employers to require employees to sign arbitration agreements with class action waivers as a condition of employment.

Over the last few years, the US Supreme Court has issued a series of decisions upholding arbitration agreements with class waivers. However, the decisions did not directly address California state law restrictions on enforcing such class waivers in employment disputes. The California Supreme Court has now reconciled this, in its long-awaited ruling in *Iskanian v. CLS Transportation Los Angeles LLC*.

In *Iskanian*, the Court ruled that class waivers are permissible under the Federal Arbitration Act (FAA) and the FAA preempts state laws to the contrary. Therefore, the Court concluded, arbitration agreements can permissibly require employees to arbitrate their own individual employment claims and not assert them as class actions.

In reaching this conclusion, the Court rejected the argument that employees are entitled to bring class actions as protected concerted activity under federal labor law. The Court found no evidence that Congress intended federal labor law to override the FAA's broad mandate favoring arbitration per the terms of the parties' arbitration agreement.

In so ruling, the Court aligned itself with nearly every other court that has considered this issue to date, including the Ninth Circuit. The vast majority of courts addressing this issue have ruled similarly that employment arbitration agreements with class waivers do not run afoul of federal labor laws that permit employees to engage in protected concerted activity.

Employers should take note, however, that the National Labor Relations Board (NLRB) continues to assert that class waivers in employment arbitration agreements are an unfair labor practice. The NLRB has a policy of non-acquiescence, and takes the position that it is only bound by rulings of the US Supreme Court. This issue is likely to work its way up to the US Supreme Court, and at that point it will be resolved once and for all. When that occurs it is anticipated that, consistent with most court rulings to date, the enforceability of class waivers in arbitration agreements will again be upheld.

Further, although *Iskanian* generally supports class waivers in employment arbitration agreements, the Court also ruled as a caveat that a pre-dispute arbitration agreement cannot require employees to waive their right to bring *representative* actions for California Labor Code civil penalties under the Private Attorneys' General Act (PAGA**).**

The Court reasoned that PAGA claims are not on the same footing as private disputes between employees and their employers over wages or working conditions. Rather, in a PAGA claim the employee acts as a "private attorney general" to collect civil penalties on behalf of the state, and 75% of the proceeds go to the state's coffers. The Court ruled that, unlike with a class waiver, a pre-dispute arbitration agreement cannot compel the waiver of representative PAGA claims. Even so, the arbitration agreement's class waiver is still enforceable for other asserted claims.

In light of the *Iskanian* ruling, the efforts of some plaintiffs might shift to prosecuting representative claims under PAGA. However, these are subject to considerably shorter statute of limitation rules and the lion's share of a recovery goes to the state. It also remains to be seen whether the US Supreme Court will be asked by CLS Transportation to review the PAGA portion of the *Iskanian* decision.

Caveats aside, *Iskanian* is a solid win for employers. This ruling presents opportunities for businesses to manage some of the risks and costs associated with mounting a class action defense, by implementing well-drafted employment arbitration agreements with class waivers.

Companies wishing to take advantage of *Iskanian* should consider consulting with counsel on how best to develop and maintain cost-effective employee dispute resolution programs. Such measures might include drafting or revising employment arbitration agreements to include class waivers, bringing motions to dismiss class claims and to compel arbitration of employees' individual claims, and efficiently resolving individual claims in arbitration.

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