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PERSPECTIVE

PAGA claims are alive and well, for now

By Robert S. Cooper

The 9th U.S. Circuit Court of Appeals' decision in *Sakkab v. Luxottica Retail N. Am.*, 2015 DJDAR 10850 (Sept. 28, 2015), upholding the "Iskanian rule" in California federal courts, is important for California employers and employment law practitioners. The decision, which supports the application in California federal courts of the landmark California Supreme Court case, *Iskanian v. CLS Transportation Los Angeles*, 59 Cal. 4th 348 (2014), held that waivers of Private Attorney General Act claims are unenforceable. *Luxottica* guarantees that PAGA claims will be with us for the immediate future in California, since employers will not be permitted to include such claims in their standard arbitration clause/class action waivers signed by their employees.

Although it is difficult to be surprised by any 9th Circuit decision, *Luxottica* is surprising in that it appears to depart from what lower federal courts in the circuit have said.

PAGA claims are similar to qui tam actions, and are brought on behalf of the state of California to recover penalties against employers for violations of the California Labor Code. The statute reflects the

state's recognition that it lacks the resources to conduct widespread enforcement of the myriad laws set forth in the Labor Code. Under the PAGA, an employee brings the case on behalf of him or herself and any "similarly aggrieved" employees. Recovery is for civil penalties for particular violations, typically several hundred dollars per violation. The state keeps 75 percent of any penalties recovered, and the aggrieved employees recover 25 percent.

PAGA actions are seldom litigated through trial in since class actions are the preferred means of bringing representative cases for Labor Code violations. However, with recent U.S. and California Supreme Court decisions upholding the use of class action waivers, PAGA actions should increase. Unlike class actions based upon Labor Code violations, which typically have a statute of limitation of three to four years, PAGA claims have only a one-year statute of limitation. However, attorney fees are recoverable in PAGA actions, which provides incentive to plaintiff employer lawyers to bring such claims.

Luxottica upholds a carve-out for PAGA representative claims, which means employers cannot require employees to waive those claims as a condition of employment. The carve-out gives plaintiffs' employ-

ment lawyers a way to bring representative actions even if an employee has waived his or her right to participate in a class action. Moreover, since California employers may require employees to waive the right to participate in a class action as a condition of employment (although they retain their right to bring any action individually in arbitration), we can expect that the recent uptick in PAGA representative actions will continue and increase since they are really the only alternative to an employment class action.

Unlike the *Luxottica* court, lower federal courts in the 9th Circuit have almost uniformly refused to enforce the *Iskanian* rule and upheld waivers of PAGA claims when they were included in arbitration agreements. As Judge Milan Smith Jr. points out in his dissent in *Luxottica*, the decision would seem to fly in the face of the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), which held that the Federal Arbitration Act enacted by Congress in 1925 preempts state laws deemed hostile to arbitration. Smith said the court should have upheld the "liberal federal policy favoring arbitration."

The 9th Circuit majority held, however, that the Federal Arbitration Act does not preempt the rule

set forth by the California Supreme Court in *Iskanian*, agreeing with the California high court that because PAGA actions are really actions brought by an employee on behalf of the state, and not on behalf of other absent employees like a class action, they do not interfere with the arbitration rights of employees.

It is difficult to know whether the U.S. Supreme Court will decide to take up the 9th Circuit's decision in *Luxottica*. Although the decision seems to conflict with the broad preemptive scope of the Federal Arbitration Act outlined by the U.S. Supreme Court in *Concepcion*, it still involves a California statute with no application to other states. We will have to wait and see, it is clear that PAGA actions are here to stay in California at least for now.

If they have not already done so, California employers will need to re-vamp their arbitration/class action waivers signed by employees, to make sure that PAGA claims are not included in the waivers, since in all California state and now federal courts, such waivers are invalid.

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